

①
91-186

NO.

Supreme Court, U.S.
FILED

JUL 29 1991

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MID-OHIO COMMUNICATIONS, INC.,
-
PETITIONER

V.

FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl B. Fry
Barry A. Waller*
Attorneys for Petitioner
FRY & WALLER CO., L.P.A.
35 East Livingston Avenue
Columbus, Ohio 43215
614/228-2300
*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may disqualify an applicant seeking renewal of a broadcast license as the result of a single omission to disclose a material fact.

2. Whether violations of the Federal Communications Commission rules which may result in a loss of a broadcast license must be proved by clear and convincing evidence rather than by a preponderance of the evidence.

3. Whether the Federal Communications Commission may reverse the credibility findings of an Administrative Law Judge where the reversal is not supported by substantial, clear and convincing evidence.

4. Whether a decision by the Federal Communications Commission based upon pervasive class bias is arbitrary and capricious and therefore unlawful.

LIST OF PARENTS AND SUBSIDIARIES

Petitioner, Mid-Ohio Communications, Inc. is an Ohio corporation organized under the laws of the State of Ohio. Mid-Ohio Communications, Inc. has one (1) shareholder: QNP Corporation, an Ohio corporation, which owns 484 (100%) shares. Neither QNP Corporation nor Mid-Ohio Communications, Inc. has issued shares or debt securities to the public.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parents and Subsidiaries	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Petition	9
Conclusion	12
 Appendix A	 A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1
Appendix E	E-1
Appendix F	F-1
Appendix G	G-1
Appendix H	H-1
Appendix I	I-1

TABLE OF AUTHORITIES

Cases and Administrative Decisions:

<u>Faulkner Radio, Inc. v. F.C.C.,</u> 557 F.2d 86 (D.C. Cir. 1977)	8
<u>F.C.C. v. WOKO, Inc.,</u> 329 U.S. 223 (1946)	9, 10
<u>Fox River Broadcasting Co.,</u> 88 F.C.C. 2d 1132, 1136 n. 9 (Review Bd. 1982), <u>modified on other grounds,</u> 93 F.C.C. 2d 127 (1983)	10
<u>Omaha TV 15, Inc.,</u> 4 F.C.C. Rcd. 730 (1988)	8
<u>Sea Island v. F.C.C.,</u> 627 F.2d 240 (D.C. Cir. 1980)	10
<u>Steadman v. S.E.C.,</u> 450 U.S. 91 (1981)	10

Statutes:

47 U.S.C. 402(j)	2
------------------------	---

Regulations:

47 C.F.R. 1.65	2, 3, 4, 5, 7
----------------------	---------------

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO.

MID-OHIO COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Mid-Ohio Communications, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on April 30, 1991.

OPINIONS BELOW

The Judgment of United States Court of Appeals for the District of Columbia Circuit affirming the Orders of the Federal Communications Commission without opinion is set forth in the Appendix at p. A-1. The Orders of the Federal Communications Commission were released on February 21, 1990 and July 23, 1990, respectively and are set forth in the Appendix at p. E-1 and p. F-1. The Decision of the Review Board, released on July 9, 1986 is set forth in the Appendix at p. D-1. The Initial Decision and Supplemental Initial Decision of Administrative Law Judge John H. Conlin before the Federal Communications Commission, released September 16, 1983 and December 23, 1985 are set forth in the Appendix at p. B-1 and p. C-1, respectively.

JURISDICTION

The Judgment of the Court of Appeals (Appendix at p. A-1) was entered on April 30, 1991. The jurisdiction of this Court is invoked under 47 U.S.C. 402(j), which is set forth in its entirety at Appendix p. G1.

STATUTORY PROVISIONS INVOLVED

47 C.F.R. 1.65(a) of the Federal Communications Commission's rules provides, in part as follows:

"Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within thirty days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within thirty days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with §1.47."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 1, 1979, the Petitioner, Mid-Ohio Communications, Inc. ("Mid-Ohio") filed an application for the renewal of the license of radio station WBBY (FM), Westerville, Ohio. An application for a construction permit for the same facility was also filed by Metro Broadcasting, Inc. ("Metro"). From

November 16, 1982 through November 18, 1982 a competitive hearing was held to determine which applicant would ultimately receive the license to operate the station. Subsequently, by agreement between Mid-Ohio and Metro, Metro was dismissed from the case with prejudice, thereby extinguishing those issues relating to the competitive application.

However, Metro's claims concerning Mid-Ohio's proposal to integrate ownership with management (the "integration proposal") remained.¹ Most notably, the issue of whether Mid-Ohio violated 47 C.F.R. 1.65(a) (§1.65(a) of the Federal Communications Commission's rules) had occurred by the failure of Mid-Ohio to report the changed employment status of Richard Nourse and whether during the competitive hearing, the facts surrounding Richard Nourse's employment were misrepresented. From July 23 through July 26, 1985 evidentiary hearings (the "subsequent hearings") were held before Administrative Law Judge John H. Conlin (the "ALJ") on Mid-Ohio's alleged violation of §1.65(a) of the Federal Communications Commission's rules.²

The ALJ in his Supplemental Decision (Appendix at p. C-27) found that the license should be renewed. The Review Board, however, reversed the ALJ. Subsequently, the Federal Communications Commission (the "Commission"), in its Orders dated February 21, 1990 and July 23, 1990, affirmed the finding of the Review Board. (Appendix at pp. E-3 and F-6). The United States Court of Appeals for the District of Columbia, on April 30, 1991, affirmed the Orders of the Commission without an opinion (Appendix at p. A-1). It is from the judgment of the United States Court of Appeals for the District of Columbia Circuit (affirming the Commission's Orders without an opinion) which Mid-Ohio seeks review in this Court.

¹ Mid-Ohio proposed, as part of its integration proposal, that inter alia, Richard P. Nourse would work full-time for the station.

² The initial decision of the ALJ is inapposite to this petition and therefore is not discussed.

B. STATEMENT OF FACTS

1. Proceedings Before The ALJ.

The subsequent hearings were commenced on July 23, 1985 and continued through July 26, 1985. The primary determinations which were to be made at these hearings as they related to the renewal of Mid-Ohio's license were: (1) whether Mid-Ohio violated §1.65 of the Commission's rules by failing to report the changed employment status of Richard Nourse; (2) whether during the initial hearings on Metro's competitive application, Mid-Ohio misrepresented facts regarding Richard Nourse's employment plans; and (3) the effect thereof on Mid-Ohio's basic or comparative qualifications.

At these hearings, the relevant testimony surrounded Richard Nourse's employment with Mid-Ohio and Pioneer Cadillac-Chevrolet, an automobile dealership in Marietta, Ohio owned by the Nourse family. Briefly stated, in "answers and objections to interrogatories" filed by Mid-Ohio on September 1, 1982, Mid-Ohio stated that Richard Nourse was and would be the station manager of WBBY and that he spends forty hours or more per week on station affairs. Mid-Ohio further stated that Richard Nourse would occupy this position indefinitely from September 1, 1982 and that he no longer was working at Pioneer Cadillac-Chevrolet in Marietta, Ohio. (Appendix at p. C-3)

On October 25, 1982, Mid-Ohio supplemented its interrogatory answers and indicated that the time which Richard Nourse had devoted to station affairs "varied since September 1, 1982." (Appendix at pp. C-3 and C-4). The sole issue surrounding the Commission's Order refusing to renew Mid-Ohio's license resulted from Mid-Ohio's failure to disclose to the Commission Richard Nourse's resumption of duties at Pioneer Chevrolet-Cadillac during the time when he was devoting forty hours per week to the management of WBBY. During the relevant time periods, Richard was spending varying amounts of time physically away from the station when he was attending to his duties at the dealership in Marietta, Ohio.

During the subsequent hearings before the ALJ regarding this matter, four key witnesses testified: Carl C. Nourse (Richard's father), Richard Nourse, Brian McIntyre (who was hired by Carl C. Nourse as a consultant for WBBY) and David

Freeman (who was initially sales manager and then general manager of WBBY). The ALJ concluded that more weight should be given to the testimony of the Nourses and Brian McIntyre than that of David Freeman. The ALJ stated as follows:

"Though the presiding officer does not doubt Freeman's essential veracity, greater weight has been given to the testimony of Brian McIntyre as to Richard Nourse's participation in station affairs. First of all McIntyre had been specifically assigned to the task of working with Richard and familiarizing him with the operation of a broadcast station. Secondly, until some time in 1983 the geographic configuration of the WBBY operation was such that it would be difficult for Freeman to account for many of the activities attributed to Richard with any degree of certainty Thirdly, as described below, Freeman's position at the station was always tenuous, and there is little reason to believe that he would be fully informed regarding Richard's activities." Administrative Law Judge Supplemental Initial Decision (FCC 85D- 75 at 13) (Appendix at p. C-19).

Finally, the ALJ concluded that the conduct of the applicant amounted to a single transgression. (Appendix at p. C-26) The ALJ stated that "the presiding officer regards McIntyre as being more knowledgeable regarding Richard's activities and his testimony, therefore, more reliable than Freeman's." (Appendix at p. C-20)

The determinative issue presented to the Commission was whether or not Mid-Ohio should have reported to the Commission the fact of Richard Nourse's employment at Pioneer Cadillac-Chevrolet and if this additional employment constituted a substantial change of material significance to which \$1.65 of the Commission's rules applies.

In September 1982, Richard Nourse reported that he was no longer employed at Pioneer Cadillac-Chevrolet. However, subsequent to that representation, Richard Nourse, due to unforeseen circumstances, again became involved, on a part-time basis, with the management of Pioneer Cadillac-Chevrolet

in Marietta, Ohio. The record does, however, reveal that he still devoted substantial hours to the management of WBBY (Appendix at p. C-24).

Although during the course of the renewal application process, Richard Nourse temporarily changed his employment whereby he was working part-time at an automobile dealership owned by Carl C. Nourse, (one of the principals of Mid-Ohio), the ALJ found that Richard Nourse's involvement with the radio station had been sufficiently extensive to support a good faith belief that he was spending at least forty hours per week on station affairs (Appendix at p. C-24).

The ALJ held that when Richard Nourse became employed part-time at Pioneer Cadillac-Chevrolet he should have disclosed his changed employment circumstances to the Commission (Appendix at p. C-24). Additionally, the ALJ found at the hearing that while Richard Nourse's representations regarding his employment at WBBY were not, strictly speaking, untrue, the failure to disclose his simultaneous employment at Pioneer Cadillac Chevrolet constituted a lack of candor (Appendix at p. C-25).

Notwithstanding these factual findings, the ALJ determined that the denial of the application to renew Mid-Ohio's license would be a more severe sanction than was warranted (Appendix at p. C-27). The ALJ further found that Richard Nourse continued to work at the station and for most of the relevant time period was in reasonable compliance with the commitment made in Mid-Ohio's direct case exhibit regarding ownership integration (Appendix at p. C-26). Lastly, the ALJ specifically found that the conduct in question amounted to what was in fact *a single transgression*: failure to disclose a material fact involving one aspect of its integration proposal (Appendix at p. C-26).

2. Review Board Proceedings.

The ALJ's findings were based upon the testimony of the three witnesses referred to above. Notwithstanding the ALJ's first-hand determination of the credibility of those three witnesses, the Review Board and subsequently the Commission, chose to place more credence on the testimony of the fourth witness, David Freeman. The Review Board and the Commission chose to do this even though his testimony, in some respects, contradicted the testimony of the applicant's

other three witnesses regarding Richard Nourse's devotion of time to the management of WBBY.

Despite the affirmative findings of the ALJ, the Review Board, in its Decision, (Appendix at p. D-37), reversed the Order of the ALJ. The Nourse family owns several automobile dealerships in Central Ohio. It is noteworthy that the Review Board manifested a prejudice against automobile dealers throughout its Decision. The Decision of the Review Board is replete with derogatory remarks which constitute nothing less than a character assassination of the Nourses (Appendix at pp. D-28, D-30 and D-32).

Perhaps the Review Board's most outrageous exhibition of its prejudice occurred when it stated:

"It was then abundantly clear that Richard had not been the spark plug he claimed to be at WBBY(FM); he was a simple hood ornament in Westerville, while the rest of the vehicle was parked in Marietta." (emphasis added) (Appendix at p. D-30).

Further, the Review Board stated:

"It may be posited that Mr. Nourse's oily evasiveness and continued efforts to grease the wheels of administrative due process preclude a sound determination of who was, in fact, WBBY(FM)'s "mystery manager". In any event, it is doubtful that it was Chevrolet's 'Mr. Goodwrench'." (emphasis added) (Appendix at p. D-32).

Additionally, the Review Board stated:

"Indeed, the fact that Richard Nourse motored to Marietta and Pioneer Chevrolet, and by his own admission had exhausted of the day to day operation of WBBY, was muffled and not disclosed to the Commission until January 28, 1985". (emphasis added) (Appendix at p. D-30)

In making its own credibility determinations of witnesses which it did not observe, the Review Board held that Mid-Ohio had "conducted a pattern of wilful, deliberate and repeated violations of the Commission's rules" respecting §1.65 (Appendix at p. D-36).

The Review Board's Decision is pervaded by prejudice against automobile dealers.³ As evidenced above, the Board, without benefit of first-hand observation of the witnesses, repeatedly demeaned the Nourses because of their association with the automobile industry. In fact, Board Member Blumenthal declared "that no one in control of their senses would buy the proverbial 'used car' from them" and suggests that truth to this licensee is "not unlike the condition or history of a used Chevrolet." (Appendix at p. D-39) The Review Board's assessment of credibility of witnesses which it did not hear testify is repugnant to the administration of justice and due process of law afforded to citizens and businesses alike in this country. The Review Board's assessment of credibility was pivotal in its decision to reverse the recommendation of the ALJ.

3. Proceedings Before The Commission.

Although the Commission, in footnote 4 to its Decision, disavows the Review Board's derogatory references to people in the automobile industry, the Commission failed to find that the Review Board's prejudice was at the heart of its Decision to overturn the ALJ's determination that Mid-Ohio was not guilty of misrepresentation of facts at the hearings. (Appendix at p. E-4). In accordance with Faulkner Radio, Inc. v. F.C.C., 557 F.2d 86 (D.C. Cir. 1977), the pervasive prejudice against automobile dealers as evidenced by the Review Board's Decision casts a dark shadow upon the legitimacy of that Decision and the Commission's approval of the same, and consequently cries for a reversal of that Decision.

This pervasive prejudice, when coupled with the Commission's failure to acknowledge its own precedent regarding "hands on management", distinctly brings to light the unlawfulness of the Commission's Decision. Contrary to the Commission's views expressed with regard to Mid-Ohio, the Commission, in Omaha TV 15, Inc., 4 F.C.C. Rcd. 730 (1988), stated that:

³ Also, the Review Board's comments at pages 20 and 22 of its Decision further underscored its prejudice against Mid-Ohio (Appendix at pp. D-28, D-30 and D-32).

"As a general rule, we must presume that an individual manager knows better than the Commission how to most productively manage a radio or television station. Nor can we ignore that technological advances in communications, transportation, information processing, and office automation between 1965 and 1988 have made it more feasible for a manager to manage a broadcast station on a day-to-day basis without the need for physical presence at the station every day. We should acknowledge that we lack the omniscience to determine that a licensee will better serve the public interest by spending thirty hours of work over five business days rather than three."

Both the Review Board and the Commission ignored the undisputed testimony and the ALJ's determination that Richard Nourse devoted forty hours a week to management of the station. Incredulously, the Board, because of its prejudice against automobile dealers (and the Commission in affirming the Review Board), ignored that Richard had the capability to and did devote the time to management of the radio station from off the radio station site.

Consequently, as the result of the Commission's adoption of the Review Board's Decision which is pervaded with prejudice and not supported by substantial, clear, and convincing evidence to reverse the credibility finding of the ALJ, the Commission's orders are arbitrary and capricious. The Commission's Orders and the judgment of the United States Court of Appeals for the District of Columbia must be reversed.

REASONS FOR GRANTING THE PETITION

The Decision of the Court of Appeals and the Commission is a case of major importance involving a significant Federal Regulatory issue that has not been reviewed by this Court since its Decision in FCC v. WOKO, Inc., 329 U.S. 223 (1946). In that case, this Court affirmed the non-renewal of a license where the applicant for that license concealed stock ownership from the Commission for over a period of twelve years. The Court further upheld the Commission's position that the applicant

was guilty of "a systematic course of deception." Since the WOKO, Inc. case, this Court has not addressed the circumstances under which the Commission is warranted in refusing to renew a broadcast license. This Court has also not reviewed the applicable standard of proof to be utilized by the Commission when it is reversing credibility finds of the ALJ who heard the case in the first instance.

Unlike the WOKO, Inc. case, the Commission in this case has denied Mid-Ohio's renewal of its license for what the ALJ found to be a single transgression. Although the ALJ saw and heard the witnesses so as to be in a position to judge their credibility, the Commission (by affirming the Decision of the Review Board) reversed those credibility determinations and imposed the "death" sentence upon Mid-Ohio.

In cases such as this case, where a death sentence can be handed down against a license holder, that sentence should only be affirmed where there is clear and convincing evidence which warrants the reversal of the findings of the ALJ.

As has been determined by the United States Court of Appeals for the District of Columbia Circuit, clear and convincing evidence has always been the standard of proof which must be maintained in order to revoke or failure to renew a broadcast license. Sea Island v. FCC, 627 F.2d 240 (D.C. Cir. 1980).⁴ The Commission, in its orders which are subject to the review in this case, nowhere states which burden of proof, if any, it utilized in making its determinations regarding Mid-Ohio. However, the Review Board, at p.26 of its Decision, concludes that "The preponderance of the record evidence, as a whole, establishes that MOC [Mid-Ohio] conducted a pattern of wilful, deliberate and repeated violations of the Commission's rules." (Appendix at p. D-37)

This Court in Steadman v. S.E.C., 450 U.S. 91 (1981) has held that the applicable burden of proof under the Administrative Procedure Act is by a preponderance of the evidence. However, Mid-Ohio's case is distinguishable. This case is unique in that the ALJ's credibility findings were reversed by the Review Board

⁴ The Commission, in Fox River Broadcasting Co., 88 F.C.C. 2d 1132, 1136 n. 9 (Rev. Bd. 1982), modified on other grounds, 93 F.C.C. 2d 127 (1983), held that the preponderance standard is applicable in Commission hearings.

and the Commission. It was the reversal of these credibility findings by the Review Board and the Commission which led to the disqualification of Mid-Ohio. As the result of the appellate posture assumed by the Review Board and the Commission, this Court should set forth the guidelines upon which credibility findings by a fact finder may be reversed by a reviewing court or administrative agency.

This Court should pronounce the guidelines applicable to the administrative agencies which reverse credibility finds of the ALJ. Not only will these guidelines aid all administrative agencies in reaching fair results, but are critical to the fair and just adjudication of this case. This need is highlighted by the Review Board's credibility determinations which were reached, not by reviewing the record and determining whether the ALJ's determination was supported by the evidence, but directly from its prejudice against automobile dealerships. In the history of the jurisprudence of this country, courts have consistently held that credibility determinations by fact finders will not be reversed by reviewing authorities unless there is no evidence to support those determinations. In this case, the evidence presented by Mid-Ohio unquestionably supports the findings of the ALJ; not the Review Board or the Commission. Consequently, Mid-Ohio submits that the Steadman case has been misapplied in the context of the proceedings before the Commission resulting in the non-renewal of Mid-Ohio's license.

The injustice imposed upon Mid-Ohio in this case is further illustrated by pervasive prejudice exhibited by the Review Board when it repeatedly degraded the Nurses because of their affiliation with the automobile industry. Although the Commission disavowed these statements, it was these very statements that were at the root of the Review Board's Decision to reverse the findings of the ALJ. A reading of the Decision of the Review Board clearly shows the lack of administrative due process which was afforded the applicant in this case. Notwithstanding the Commission's disavowal of these comments, the Commission adopted the Review Board's Decision, despite the fact that the Decision was clearly based on a pervasive class prejudice against automobile dealers.

In conclusion, if this Court were to grant this Petition for a Writ of Certiorari, this case will permit it to review the circumstances under which an administrative agency is justified in its refusal to renew a license, to determine the circumstances in which a fact finder's credibility findings may be reversed by a reviewing authority, and to condemn the arbitrary and capricious actions by an administrative agency which are based upon pervasive class prejudice.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRY & WALLER CO., L.P.A.
Attorneys for Respondent
35 East Livingston Avenue
Columbus, Ohio 43215
614/228-2300

By: Carl B. Fry
CARL B. FRY

By: Barry A. Waller
BARRY A. WALLER

Appendix A

NOT TO BE PUBLISHED —
SEE LOCAL RULE 14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-1433

September Term, 1990

Mid-Ohio Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

**APPEAL FROM THE
FEDERAL COMMUNICATIONS COMMISSION**

Before

BUCKELY, WILLIAMS, and RANDOLPH,
Circuit Judges

J U D G M E N T

This case was heard on the record from the Federal Communications Commission and was briefed and argued by counsel. Though the issues presented occasion no need for an opinion, we have accorded them full consideration. *See* D.C. Cir. R. 14(c). On consideration thereof and substantially for the reasons set forth in the Commission's and the Review Board's decisions, it is

ORDERED AND ADJUDGED by the court that the Commission's order appealed from herein be affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15. This instruction to the clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For the Court:

Constance L. Dupre,
Clerk

Appendix B

FCC 83 Dk-53 6371

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	
)	
MID-OHIO)	BC DOCKET NO. 82-282
COMMUNICATIONS, INC.)	File No. BRH-790601F6
)	
For Renewal of License of)	
Station WBBY(FM),)	
Westerville, Ohio)	
)	
METRO BROADCASTING,)	BC DOCKET NO. 82-283
INC.)	File No. BPH-790904AK
Westerville, Ohio)	
)	
For Construction Permit)	

Appearances

Paul Glist and John E. Hoover, on behalf of Mid-Ohio Communications, Inc.; Thomas L. Root, on behalf of Metro Broadcasting, Inc.; and Stephen Yelverton, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW

JUDGE JOHN H. CONLIN

Issued September 6, 1983; Released September 16, 1983

Preliminary Statement

1. On June 1, 1979, Mid-Ohio Communications, Inc. (Mid-Ohio) filed an application for renewal of the license of station WBBY (FM), licensed to Westerville, Ohio. On September 4, 1979, an application for construction permit for the same facility was filed by Metro Broadcasting, Inc. (Metro). Thereafter, on March 14, 1980, an application to transfer control of Mid-Ohio was filed by QNP Corporation (the transferee, hereafter referred to as QNP) and William R. Bates (the transferor). At the time Bates owned 50.1% of the stock in Mid-Ohio, QNP 25% and Richard Nourse 24.9% (90 F.C.C. 2d 114, 115, (1982)).¹ The application contemplated the acquisition by QNP of Bates' ownership interest, making QNP Mid-Ohio's controlling stockholder. On June 1, 1982 the Commission approved the transfer of control and designated Mid-Ohio's renewal application for a comparative hearing with Metro's pending application for the same facility. The Commission expressed two reasons for approving the transfer of control instead of deferring action until the renewal application was acted upon: (1) without the approval WBBY(FM) would "remain hamstrung," adversely affecting its ability to operate in the public interest; and (2) approving the transfer was the only reasonable way of assuring a meaningful hearing between Mid-Ohio and Metro (90 F.C.C. 2d at 117).²

2. The following issues were designated for hearing (90 F.C.C. 2d at 122):

- (1) To determine with respect to Metro Broadcasting, Inc.:
 - (a) whether it has sufficient funds to meet its proposed costs of construction and operation for three months; and
 - (b) whether, in light of the evidence adduced pursuant to (a) above, applicant is financially qualified.

¹ The citation is to the Memorandum Opinion and Order designating this case for hearing as officially reported. This citation will be used throughout the Initial Decision.

² The "unique" circumstances which dictated this result are set forth in the Commission's Memorandum Opinion and Order and will be referred to in passing throughout this decision. It is noted that following the Commission's action the transfer was consummated, with QNP acquiring control of Mid-Ohio in the late summer of 1982.

- (2) To determine which of the proposals would, on a comparative basis, better serve the public interest.
- (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

The funds availability issue was summarily resolved in Metro's favor on the first day of the hearing, and the decision was memorialized in a Memorandum Opinion and Order released on December 6, 1982 (FCC 82M-3849). Thus, only the comparative issue remains.

3. Prehearing conferences were held on July 21, 1982 and September 27, 1982. An admissions session was held on November 16, 1982 in Columbus, Ohio, and on the same day the hearing began, continuing through November 18, 1982. Proposed findings of fact were filed by the applicants on December 28, 1982 and replies were submitted on January 24, 1983.

Findings of Fact

Mid-Ohio.

4. Mid-Ohio, licensee of station WBBY(FM), Westerville, Ohio, is a corporation organized under the laws of the State of Ohio. Mid-Ohio has two shareholders: QNP owns 362 shares (75.3%) and Richard Nourse owns 119 shares (24.7%). Carl C. Nourse is president, treasurer and a director of Mid-Ohio. Richard Nourse is vice president and a director of Mid-Ohio and station manager at WBBY(FM). Mary P. Nourse is a director of Mid-Ohio and public affairs director at WBBY(FM). Carl and Mary Nourse are husband and wife and Richard is their son.

5. QNP is a corporation owned by Carl and Mary Nourse, Mr. Nourse owning 66.67% of the stock and Mrs. Nourse 33.33%. Effectively, then, Carl Nourse has a 50.2% interest in Mid-Ohio, his wife a 25.1% interest and their son a 24.7% interest. None of the Nourses has an interest in any other medium of mass communications.

6. Integration of Ownership with Management. Each of the Nourses proposes to work at the station: Carl Nourse on a part-time basis (20 hours per week), his wife and son full time (40 hours per week).³

7. Carl Nourse is ultimately responsible for all aspects of WBBY(FM)'s operations and is directly involved in the financial, business and public affairs areas (Mid-Ohio Ex. 2). For example, he attempts to sign all checks in excess of \$50, and he reviews cancelled checks when they are returned to the company (Tr. 167). He also sets guidelines for programming, handles complaints, assures compliance with applicable regulations and oversees public affairs efforts. Nourse makes the final decision in all areas of the station's operations (Mid-Ohio Ex. 2) and recently directed the revamping of the station's format to broaden its appeal (Tr. 165-66). He also testified that he created a manual for station employees and "set policies [on] how to deal with situations so that both the employee and management would know the ground rules" (Tr. 219).

8. Nourse is in frequent contact with employees at the station and meets with all department heads on Tuesday of each week (Tr. 221). To ensure compliance with applicable regulations, he refers frequently to the station's chief engineer, John McKinley, and to communications counsel (Tr. 166-67). In addition the station employs a general manager, David Freeman, who is responsible for the "overall sound of the station" (Tr. 438) and functions as a sale manager as well (Tr. 168).

9. Nourse does not maintain an office at the radio station, but does much of his work in an office he maintains at his principal place of business, Quality Chevrolet, Inc., which is located 13 miles from the station. Quality Chevrolet is a franchised Chevrolet dealer with 85 to 90 employees, and Nourse devotes about 25 to 30 hours to his position as president of the corporation.

³ In succeeding paragraphs the participation of the Nourses is cast in the present tense since each has been carrying out the duties described since the time the Commission approved the transfer of control to QNP (para. 1, supra).

10. Nourse was born in Columbus, Ohio and has resided in Worthington since 1966. Worthington is located about seven miles from Westerville and is within the service area of WBBY(FM) (Tr. 78). He is active in civic affairs within the station's service area. He is chairman of the finance committee and is a member of the board of trustees of the Methodist Theological School of Ohio in Delaware, Ohio. He has participated in the organization for the last six years and devotes 8 to 12 hours per week to his positions there. He is a member of the finance committee of the board of trustees of the Boy Scouts of Ohio (for 16 years) and a member and treasurer of the Worthington Methodist Church (for 7 years). He is also a member of the board of trustees (and various committees, including the executive committee) of the Riverside Methodist Hospital (for 8 years). Riverside is the regional hospital for the northern Columbus area, including Westerville.

11. Mary P. Nourse is a director of Mid-Ohio and is the public affairs director at the station. As public affairs director she is responsible for public service announcements aired on WBBY(FM) and for continuing ascertainment of community problems and needs. She confers with Carl Nourse and the program director to ensure that the needs of the Westerville public are adequately served. She participates actively in the production of the station's public affairs vignettes, for which she selects topics, seeks out groups in the local community and conducts interviews with spokespersons on topics of interest to the public. Mrs. Nourse visits regularly with Westerville community groups.

12. A resident of Worthington, Ohio since 1966, Mrs. Nourse is a member of the Worthington Historical Society (for the past 15 years), the United Methodist Church Women's Club (for 16 years), and the administrative board of the Worthington United Methodist Church (for 16 years). For the last 12 years, she has been the treasurer of the women's board of the Boy Scouts of America. She has also been a member of the board of directors of the Miami University Alumni of Franklin County and a past member and treasurer of the Worthington Women's Club (for 16 years). She also participates in the annual fund drives for the local chapters of the Heart Association and Cancer Society.

13. Richard Nourse is vice president, secretary and a director of Mid-Ohio and station manager for WBBY(FM). As station manager he assists the general manager in overseeing the day-to-day operations of WBBY(FM). His responsibilities include assisting in the management of the station's business affairs, conducting personnel interviews, doing market research, overseeing EEO compliance, maintaining the station's payola file and assisting in the sales area. He is also in charge of public relations and station management.

14. Nourse' broadcast experience began in 1980 when he joined the radio club at Wittenberg University's WUSO-FM. During the next six months, he was on the air between 7:00 a.m. and 11:00 a.m. every Sunday. He also spent a 12-week internship at commercial station WAZU-FM, Springfield, Ohio, with 3 weeks in each of the following departments: general manager, disc jockey, production, and sales.

15. Richard Nourse has lived in Worthington for the past 16 years. He has been a member of the Worthington United Methodist Church for the past eight years. He became a member of the Worthington Jaycees in 1981 and was a member of the Worthington Sertoma (a local public service club) from January 1981 until February 1982. He has also been active in local fund raising activities for the Center of Science and Industry, the Columbus Symphony Orchestra and the Cancer Society.

16. Past Record of WBBY(FM). As noted in the Preliminary Statement, Mid-Ohio's current principals have been in control of WBBY(FM) only since the summer of 1982. Therefore, the relevance of the station's past broadcast record has been a matter of dispute since this proceeding began (see, e.g., FCC 82M-2767, released September 10, 1982). Metro contends that Mid-Ohio must run on its record like other licensees. Mid-Ohio argues that during the relevant license period (1976-1979), its current principals neither operated nor controlled the station; thus, it is contended, Mid-Ohio should receive neither credit nor discredit on the basis of the 1976-1979 broadcast record of the station. The presiding officer regards this issue as one of fact rather than law. A past broadcast record includes "past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant."

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 398 (1965) (emphasis added). Two of Mid-Ohio's current principals, Carl and Mary Nourse, held a minority interest in Mid-Ohio through their ownership of QNP (see paras. 4, 5, *supra*). Thus, if a factual nexus were established between Mid-Ohio's current principals and the operation of WBBY(FM), the station's past record might assume significance. If there were little or no connection, then the past programming of WBBY(FM) would not be a reliable indicator of what could be expected from an operation run by the licensee's current principals.

17. QNP became a shareholder of Mid-Ohio in the fall of 1977, when its subsidiary purchased 15 shares (3.1%) of stock. Through a series of purchases, it acquired additional shares until its ownership reached 240 shares (49.9%) in November 1978, a total that was later reduced when a 24.9% interest was sold to Richard Nourse (Mid-Ohio Ex. 1, p. 2). As noted earlier, Carl Nourse owns two-thirds of QNP's stock and his wife holds the rest.

18. At the time QNP purchased its initial shares in November 1977, Mid-Ohio's directors were William Bates, Kenneth Bates and David Mylander (Tr. 205). In December of 1977, William Bates was restrained by an Ohio court from participating in station affairs. He was removed from the presidency of the corporation by the other board members and his place as general manager was assumed by Kenneth Bates, his son, who remained until June 1982 (90 F.C.C. 2d at 115-117).⁴ In early 1978 William Bates became involved in divorce proceedings which

⁴ The Court order resulted from an action brought by a majority of the board of directors. There is an indication in the record that QNP shared the board's lack of confidence in William Bates and encouraged the lawsuit (see Metro Ex. 21). The source of the problem was Bates' medical condition, which the Court described as "severely impair[ing] his ability to function with or in behalf of [Mid-Ohio Communications, Inc.]" (Mid-Ohio Ex. 11, p. 2, see also Tr. 452-53).

ultimately led to a court order directing him to sell his interest (50.1%) in WBBY(FM) (90 F.C.C. 2d at 117). From that point until June 1982, when the Commission approved the transfer of control from Bates to QNP and the Nourses, there was "no one with an unencumbered legal right to vote the 50.1% stock interest" (*id.*), the interest residing in an escrow account. Thus, the licensee was "hamstrung, with resulting adverse effect on its ability to operate in the public interest" (*id.*)

19. Nourse testified that during this period Kenneth Bates, who was an officer as well as a director of Mid-Ohio, would occasionally call him and ask that Donald Shaw, an officer of QNP and certain subsidiaries, assist him in certain station affairs (Tr. 193). During 1979 Kenneth Bates initiated management meetings of station management personnel (Tr. 203). Messrs. Nourse and Shaw attended the meetings (Tr. 202-03) where they served as "sounding boards" (Tr. 227). Shaw was essentially an "observer" (*id.*) but Nourse would occasionally give advice when asked (Tr. 225).

20. Nourse stated that he never went to the WBBY(FM) studio before June 1982. However, he had instructed Shaw that when the latter was contacted by station management, he should "talk, respond and keep me advised" (Tr. 224). He stated that even when QNP owned as much as 49.9% of Mid-Ohio's stock, QNP had a "hands-off" relationship with the directors of Mid-Ohio (Tr. 216). QNP was never represented on the board of directors and no individual associated with QNP or any of its subsidiaries served as an officer of Mid-Ohio (Tr. 216-17). Similarly, he testified that he never hired or fired an employee for WBBY(FM), and that he did not make programming decisions for the station (Tr. 228-29). Nourse summarized his situation follows: "(T)here is no worse position to be in than minority stockholder in a closed corporation, and so you have no power, you have no voice, and so you merely just ride it out and hope for better days" (Tr. 220).

21. Donald Shaw was an officer of QNP and a number of its subsidiaries during the period 1977 through 1981 (Tr. 319-20). He testified that he was a financial consultant-independent contractor for Carl Nourse during that period (Tr. 325). After QNP became a substantial shareholder in Mid-Ohio, Shaw

stated that he received frequent contacts from Kenneth Bates (Tr. 335). He also attended WBBY(FM)' management meetings which began in January of 1979 and ran through September of that year. (Tr. 341, 348). He recalled that the following management personnel attended the meetings: Kenneth Bates, Dave Freeman (sales manager and later general manager) and Terry Wilson (an announcer and later program director) (Tr. 353). He stated that Carl Nourse also attended some of these management meetings (Tr. 346-47). Shaw described his role as that of a financial advisor or a "sounding board" (Tr. 342). With regard to his and Nourse' participation in these meetings, he stated:

You have to remember that again as consultants, advisers, what you might want to classify our position in those meetings, we had no authority or power to implement any decisions, nor did we have power to make decisions. We were never directors or officers of the corporation. (Tr. 342.)

22. Terry Wilson testified that he attended about five of the management meetings referred to in previous testimony (Tr. 419). In response to a question from Metro's counsel, he described one of the meetings as follows:

The general attitude of the meeting was as a forum for the current management of the radio station, WBBY, which was at that point Mr. Freeman, Mr. Bates and myself, to have an opportunity and a forum to meet and discuss the problems and plans of the operation of WBBY. (Tr. 418.)

He stated that Kenneth Bates, Dave Freeman, Carl Nourse and Don Shaw attended some or all of the meetings (Tr. 419-19) and that neither Shaw nor Nourse made requests for changes in the station (Tr. 442). According to Wilson, the management meetings were discontinued because Mr. Bates began to feel "uncomfortable" at the meetings — he said that other persons, generally David Freeman, asked too many hard questions of Mr. Bates at the meetings (Tr. 421-22).⁵

⁵ David Freeman also testified regarding these meetings (Tr. 433-35). His description of them was essentially similar to those given by Shaw and Wilson.

23. From the foregoing it can be seen that during most of the license term, legal control of Mid-Ohio was in limbo. The station was managed and operated by an officer and director (Kenneth Bates) and the staff, while Nourse, representing QNP's substantial minority interest, simply kept abreast of station affairs. He was not an officer or director of Mid-Ohio, nor was anyone else who was associated with QNP. There is also no evidence that Nourse or any members of his family was active in the operation of WBBY(FM). Thus, the record shows that Nourse did not have "significant participation"⁶ in the station's operation; and it is therefore found that under the unusual if not unique circumstances of this case, Nourse and QNP should not receive credit for the broadcast record of WBBY(FM) nor should they be tainted by any deficiencies attributable to its operation. That record is simply not a valid indicator of future performance by Mid-Ohio as presently constituted.

24. Notwithstanding this determination, a brief description of WBBY(FM)'s programming will be set forth in the event that a reviewing authority wishes to consider it. WBBY(FM)'s 1979 renewal application showed the following data (Metro Ex. 13, p. 3):

Program Types	Previously	Proposed	Composite Week	
	Minutes of Operation	% of Total Time	Minutes of Operation	% of Total Time
News	754	7.7	690 ⁷	7.1
Public Affairs	221	2.3	101	1.1
All Others	266	2.8	215	2.2
TOTALS	1,252	12.8	1,006	10.4

Number of 140
PSAs

147

The exhibit also showed that the following programs were broadcast on a regular basis during the renewal term (pp. 20-24):

⁶ See Policy Statement, supra. In citing the Policy Statement, the presiding officer recognizes that it was not adopted with comparative renewal cases in mind. 1 F.C.C. 2d at 393, n. 1. However, the unusual facts of this case make it more akin to initial licensing proceedings than to the typical comparative renewal case.

⁷ Metro contends that the composite week logs indicated that 561 minutes of news were carried (i.e., 5.8%) rather than the 690 minutes reflected in the application.

- a. "Westerville Town Meeting" a weekly, half-hour program emphasizing problems in the Westerville area and the activities of local groups, i.e., service organizations, etc. Knowledgeable government officials, school officials and community leaders were invited to participate and express their views.
- b. "Perspective, Parts I & II": a 47-minute weekly program analyzing national and international events.
- c. "Voices In the Headlines": a 24-minute weekly review of people and events making the news headlines.
- d. "Election Watch": a five to seven hour program covering election returns each election day.
- e. "God's News Behind the News": a 15-minute weekly religious program.
- f. "Help": an eight-minute weekly program on mental and physical tips for self-improvement.
- g. "Outdoor Notebook": a 10-minute weekly program on the history of the State of Ohio and significant locations therein.
- h. "Social Security Program": a four-minute weekly program about the Social Security program.
- i. "Forward in Faith": a 15-minute weekly religious program.
- j. "Church of God": a 15-minute weekly religious program.
- k. "Way of Truth": 1 15-minute weekly religious program.
- l. "Herald of Truth": 1 30-minute weekly religious program.
- m. "Church of the Living Savior": a 30-minute weekly religious program.
- n. "Sounds of Inspiration": a 30-minute weekly religious program.
- o. "St. John's Church": a 30-minute weekly religious program.

25. Metro introduced evidence regarding the performance of 11 other central Ohio stations which are located in communities comparable in size to Westerville (Metro Ex. 14). Of the selected stations, WBBY(FM) ranked lowest in the amount of public affairs and nonentertainment programming broadcast and ranked poorly in news programming.⁸

⁸ WBBY(FM) was at the bottom or third from the bottom depending on whether Metro or Mid-Ohio's figures are accepted. See n. 7, supra.

Metro.

26. Metro has four shareholders: Roger D. Jones owns 139 shares (27.8%); Paul A. Heinlein, 139 shares (27.8%); Jerry D. Litton, 139 shares (27.8%); and Robert Casagrande, 83 shares (16.6%). Messrs. Jones, Heinlein and Casagrande are directors and officers of Metro. Jones is the president, Heinlein the secretary, and Casagrande the treasurer. None of these individuals holds ownership interests in other media of mass communications except Jones, who owns a fractional (0.001%) interest in Taft Broadcasting Company.

27. Integration of Ownership with Management. Metro claims 55.6% full-time integration of ownership into management. Roger D. Jones will be the full-time general manager of the proposed station (Metro Ex. 10, p. 2; Tr. 372-73); and Paul A. Heinlein will be the full-time chief engineer/public affairs director.

28. As general manager, Jones will be responsible for the overall operation of the station. All other personnel will report to the general manager. His duties will include ensuring that the station is being operated in accordance with the rules and policies of the Commission, developing programming policy to be followed by the station in concert with other directors, ensuring that programming policy of the board of directors is implemented and hiring and firing personnel (Metro Ex. 10, pp. 2-3). He will, however, retain his interest in Bestway Maintenance, a business to which he presently devotes approximately 12 hours weekly, unless it interferes with his obligation to devote a minimum of 40 hours weekly as general manager of the station (Metro Ex. 10, p. 2).

29. Jones has a veteran's equivalency high school degree and has taken special training in television electronics. He is presently employed by Taft Broadcasting Company at its Columbus, Ohio, television station, WTVN-TV, as an operating and maintenance engineer, a position he will give up to assume the position of general manager of Metro's proposed station. At WTVN-TV, Jones' responsibilities include technical direction of the evening local newscast, technical direction and production of other local programs and local commercials, supervision of technical personnel employed by Taft and maintenance of electronic equipment (Metro Ex. 10, p. 3).

30. Jones has been involved in broadcasting since 1959 when he was a radio announcer and newscaster with the Armed Forces Radio and Television Service (AFRTS). He worked with AFRTS on a full-time basis for about 10 years, serving in numerous capacities: radio announcer and newscaster, chief engineer, new reporter and writer and program producer. In 1969, he left AFRTS and became a full-time engineering staff member of commercial television station KTLA-TV, Los Angeles. His duties were to assist in maintenance of the technical standards of KTLA-TV equipment. He left shortly thereafter to assume a position with WTVN-TV, Columbus (Metro Ex. 10, p. 5).

31. Jones presently resides in Reynoldsburg, Ohio, a suburb of Columbus, about 13 miles south-southeast of Westerville (Metro Ex. 10, p. 5). Reynoldsburg is not located within the predicted 1.0 mV/m contour of WBBY (Tr. 372).

32. Paul A. Heinlein will serve as full-time chief engineer and public affairs director of the proposed station. As chief engineer, he will be responsible for ensuring that the station operates within the technical rules of the Commission and for ensuring that all equipment at the station is maintained in good operating order. As public affairs director, he will be responsible for maintaining systematic contacts with the listening public in Westerville and vicinity to ascertain problems, needs and interests of the community of license and surrounding area suitable for treatment in station public affairs programming. He will oversee the preparation of programming to meet the ascertained problems, needs and interests of the area and will select the topics and participants for such programs. He will ensure that the programming presented provides a reasonable opportunity for presentation of contrasting viewpoints on the problems, needs and interests treated in the programming (Metro Ex. 11, p. 2).

33. Heinlein has resided in the greater Columbus area continuously except for military service and for two years in the 1960's. His broadcast background began in 1964 when he was employed by the Brown Publishing Company, Urbana, Ohio, to construct and commence the operation of FM broadcast station WCOM-FM. His position was full-time chief engineer.

From 1966 through 1971 he was a full-time employee of Nationwide Communications, Inc., then licensee of standard broadcast station WRFD, Worthington, Ohio, and WNCI(FM), Columbus, Ohio. As staff engineer, his duties included maintenance of equipment, preparation of maintenance and operating logs, setting up of equipment for remote broadcasts and operation of the station as an air personality on weekends (Metro Ex. 11, p. 3).

34. In 1971 he became full-time chief engineer of standard broadcast station WDLR, Delaware, Ohio, where his duties included maintenance of equipment, preparation of operating and maintenance logs, overall supervision of the station's technical operation and announcing duties on the weekend. In 1974 he returned to his former position as full-time staff engineer at WRFD(AM) for its new owner Buckeye Media, Inc. He left that position in 1980 and assumed the part-time position of operating engineer for Skyway Broadcasting, Inc., licensee of WVKO(AM) and WVKO-FM, Columbus, Ohio. He left when the stations were sold in May 1982 (Metro Ex. 11, pp. 3-4).

35. Heinlein presently lives in Delaware County, Ohio, within the predicted 1.0 mV/m contour of WBBY. He has resided there since 1968. His residence is about seven miles from Westerville (Metro Ex. 11, p. 4).

Conclusions

1. The area in which one applicant or the other seeks a comparative advantage are diversification of ownership in media of mass communications, the past broadcast record of WBBY(FM) and integration of ownership with management.

2. Diversification. Neither Metro nor Mid-Ohio has any other media interests than the applications in question. The only other media interest of any principal is the 0.001% interest of Roger D. Jones, president of Metro, in Taft Broadcasting Company. Under the Policy Statement, supra, "the less the degree of interest in other stations or media, the less will be the significance of the factor."⁹ Here, Jones' interest is so small as to be meaningless

⁹ 1 F.C.C. 2d at 394

in terms of influence or control over the policies of Taft Broadcasting Company. It is concluded, therefore, that the applicants are virtually equal in this area of comparison, and no preference will be awarded.

3. Past Broadcast Record. Ordinarily this factor is of considerable importance in contests between a newcomer and an existing licensee. This, however, is one of the rare instances where the Commission approved a transfer of control of the licensee before holding the required comparative hearing between the applicants. Metro contends that because Mid-Ohio as a corporate entity remains the licensee, its past record is highly relevant. Mid-Ohio argues that because its current principals did not control the licensee during the previous license term and did not participate in the operation of the station, the past record of WBBY(FM) provides no indication of future performance; thus they claim no "renewal expectancy"¹⁰ and contend that any shortcomings in the station's past performance should not be attributed to Mid-Ohio as presently constituted.

4. This matter has been considered at some length in the findings (paras. 16-25) and little further discussion seems warranted. The record shows that two of Mid-Ohio's current principals, Carl and Mary Nourse, held as much as 49.9% of the stock in Mid-Ohio during portions of the preceding license term through their ownership of QNP,¹¹ but that they did not participate actively in station affairs (which remained essentially in the hands of William R. Bates until a court order required his removal); they were not officers of the corporation; and neither they nor QNP were represented on the board of directors. In the circumstances, it was found that the applicant should receive neither credit nor discredit based on the past record of WBBY(FM).

5. In any event, the presiding officer considers the matter somewhat academic. Evidence was received on the past performance of the station which shows that a number of regularly scheduled nonentertainment programs were carried which can be regarded as responsive to needs and interest of

¹⁰ See Cowles Broadcasting, Inc., 86 F.C.C. 2d 993, 1012 (1981), aff'd sub nom. Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982).

¹¹ After the license term has run, Richard Nourse purchased 24.9% of Mid-Ohio stock from QNP.

the area (Findings, para. 24). The amount of such programming is from an overall standpoint rather small, both in absolute terms and in comparison with comparable stations in the area (id.) Whether it would be sufficient to warrant some preference is a moot question since Mid-Ohio, for reasons unrelated to the programming itself, claims no preference. But there is nothing in the record which establishes that less than minimal service was provided. Minimal service results in no preference (Cowles, supra, at 1012), and the presiding officer concludes that this result is appropriate here.¹² Thus, even if the past performance of WBBY(FM) were to be attributed to Mid-Ohio, the result would be neither favorable nor unfavorable to that applicant.

6. Integration of Ownership with Management. Mid-Ohio proposes 100% integration: 49.8% full time and 50.2% part time (20 hours or more per week). Mary Nourse (25.1%) devotes 40 hours per week to the position of public affairs director at WBBY(FM).¹³ Mrs. Nourse has resided in the Westerville area¹⁴ for 16 years and has been active in a number of community organizations. She has no prior broadcast experience.

¹² Metro contends that there was a failure of promise vs. performance on the part of WBBY(FM), citing discrepancies between its program proposals and actual performance during the license period (Findings, para. 24). With the vacuum that existed at the station because of William Bates' difficulties (see Findings, paras. 18, 23), it is perhaps surprising that the station functioned as well as it did. In reaching the conclusion that no demerit should be assessed, the presiding officer has taken into account the unfortunate situation in which the station found itself as a result of the medical condition of its former controlling stockholder.

¹³ As stated in the findings, her described duties and those of other Mid-Ohio principals reflect not only proposed integration but also what the principals have in fact been doing since assuming control of the station in the summer of 1982.

¹⁴ All of the Nourses live in Worthington, Ohio, a community near Westerville and within the service area of WBBY(FM).

7. Richard Nourse (24.7%) works 40 hours per week as station manager, assisting the general manager in overseeing the day-to-day operation of the station. He has lived within the service area of WBBY(FM) for 16 years and has been active in several local community groups. Prior to assuming his present duties he worked at a university radio station and held a three-month internship at WAZU-FM in Springfield, Ohio.

8. Carl Nourse devotes 20 hours per week to various station activities. As president of Mid-Ohio, he exercises general oversight of the entire operation and is directly involved in the station's business and financial affairs. He is a native of Columbus, Ohio and for the past 16 years has resided in Worthington. He has participated actively in the affairs of a local church and hospital as well as in the Boy Scouts of Ohio. Metro contends that Carl Nourse' integration should not be credited in view of his substantial responsibilities at Quality Chevrolet. This assertion is entirely speculative. The time Nourse spends at his automobile dealership (25-30 hours) does not preclude his working 20 hours per week at the station. Moreover, there is undisputed evidence that he has already effectuated the proposals since QNP assumed control of the station.

9. Turning to Metro, two of its four shareholders will be involved in the management of the proposed station, both of them on a full-time basis. Roger Jones (27.8%) is the proposed general manager, and Paul Heinlein (27.8%) will be the chief engineer and director of public affairs.

10. Jones does not reside within the service area of the proposed station and has no record of civic participation. However, he has extensive broadcast experience, having been active in broadcasting since 1959. He has served in various capacities: engineering, producing, announcing, etc., and is presently working as an engineer with WTVN-TV, Columbus. Heinlein will serve as chief engineer of the proposed station and in addition will act as its public affairs director. Since 1968 Heinlein has lived seven miles from Westerville, but within the service area of the proposed station. He has no record of civic participation, but since 1964 has occupied a variety of positions at broadcast stations throughout Ohio.

11. On the face of it, Mid-Ohio would appear to have an advantage over Metro since its full-time participation (49.8%), through somewhat less than Metro's, is supplemented by the part-time participation of a 50.2% shareholder. Metro, however, contends that the integration of Carl Nourse and Richard Nourse should not be credited because these proposals constitute (1) a variance with the application, and (2) occurred after the "B" cut-off date.

12. As to the variance, Question 27¹⁵ of the transfer application represented that Kenneth Bates would be the full-time general manager and that P. Norman Grant would be full-time program director (Att. 1 to Metro's Proposed Findings). Subsequently, in December 1981 the application was amended to note that Richard Nourse had purchased a 24.9% interest in Mid-Ohio from QNP. In addition the following revised answer to Question 27 was submitted:

A full-time General Manager of the station will determine the day-to-day programming decisions and direct the operation of the station. The present General Manager, Kenneth Bates, has submitted his resignation and will be replaced. (Att. 4 to Metro's Proposed Findings.)

The effect of the amendment was to change prior representations regarding Bates and made to reference to the roles that Carl and Richard Nourse might have in the station's operations. Thus, there is no variance between the application and the evidence. WHW Enterprises, Inc., 89 F.C.C. 2d 799 (Rev. Bd. 1982). As the Board succinctly stated in that case: "Because Question 27 does not call for an applicant's entire integration proposal, we cannot find that a variance exists when an applicant seeks integration credit at hearing for a principal not referred to in response to Question 27" (*id.* at 817). Moreover, there is no inconsistency, as Metro seems to believe, between the general oversight functions that Carl Nourse has been credited with

¹⁵ Question 27 requested the following information:

State the name(s) and position of the person(s) who determines the day-to-day programming decisions and directs the operation of the station covered by the application and whether he is employed full-time in the operation of the

and the statement in the application that day-to-day operational responsibilities will be exercised by the general manager.¹⁶

13. While there is no variance between the application and the proposals made at the hearing, Metro's contention that an improper upgrading of Mid-Ohio's application occurred after its application could be amended as a matter of right is more troublesome, at least as it concerns Richard Nourse. The following chronology indicates the problem: Mid-Ohio filed its renewal application on June 1, 1979; Metro filed its mutually exclusive application on September 4, 1979; and the transfer of control application was filed on March 14, 1980. A "cut-off" list was published on August 27, 1980, specifying October 7, 1980 as the date by which applications could be amended as a matter of right (Att. 2 to Metro's Proposed Findings). Providing this "one opportunity" for amending after a competing application has been filed "represents an effort to give the first filed applicant at least a fair opportunity to amend his application, after the filing by the competitor, but still to limit the filing of repeated amendments." Revised Processing of Broadcast Applications, 72 F.C.C. 2d 202, 212 (1979). It is well settled that amendments filed after that date which improve an applicant's comparative position will not be accepted or, if accepted, will not be considered for comparative purposes.¹⁷ Birmingham Family TV, Inc., 91 F.C.C. 2d 348, 350-352 (Rev. Bd. 1982); Cypress Communications, Inc., 47 P&F RR 2d 132, 134 (B/cast Bur. 1980); Mid-Ohio Communications, Inc., supra, at 121, n. 8.

¹⁶ In a similar vein Metro contends that Richard Nourse' participation as station manager is at odds with a prior representation (an amendment submitted in June 1981) that he would serve as assistant general manger. Regardless of the title, the findings (para. 13) show that in fact "he assists the general manager in overseeing the day-to-day operations of WBBY(FM)."

¹⁷ The rule itself, Section 73.3522 (a)(2), requires a showing of good cause before a post cut-off amendment can be accepted, good cause consisting of, among other things, a demonstration that other parties will not be unfairly prejudiced and that the applicant will not gain a comparative advantage. Birmingham Family TV, Inc., supra.

14. Richard Nourse was not a Mid-Ohio shareholder on the cut-off date; moreover, unlike his father and mother, he did not acquire his interest in June 1982 when the Commission approved the transfer of control to QNP, since he held no interest in QNP. Rather, he became a Mid-Ohio stockholder in December 1981, more than a year after the cut-off date, when QNP transferred a portion of its own Mid-Ohio stock to him, making him at the time a 24.9% shareholder in Mid-Ohio. Notice of this fact was given in an amendment to QNP's transfer application rather than Mid-Ohio's renewal application; but the effect of the stock transfer was to alter substantially the corporate structure of Mid-Ohio by permitting a newcomer to acquire nearly a one-quarter ownership interest.¹⁸

15. At the hearing Mid-Ohio proposed the integration of Carl, Mary and Richard Nourse, as described above. The integration of Carl and Mary Nourse can be credited because they are the owners of QNP, and the Commission approved the transfer of control to QNP as "the only reasonable course of action that would ensure that a meaningful comparison will be made" (90 F.C.C. 2d at 117). But Richard Nourse' interest had nothing to do with the transfer of control; he was already a shareholder in Mid-Ohio. Since his interest was acquired after the date had passed for Mid-Ohio to amend as a matter of right, his proposed integration clearly constitutes impermissible upgrading because it bears significantly on the comparative issue. It cannot, therefore, be credited.

16. Ultimately, then, Mid-Ohio will be credited with the 25.1% full-time integration of Mrs. Nourse and the 50.2% part-time integration of Carl Nourse, whereas Metro has 55.6% full-time integration. Since the Commission looks primarily to full-time participation on a day-to-day basis, with credit dropping sharply for part-time integration, Metro has a substantial quantitative preference over Mid-Ohio. As for enhancing factors, both of Mid-Ohio's integrated principals are local residents with solid civic records and one of them is a female.

¹⁸ Significantly, the amendment gave no inkling that Nourse' ownership would be subsequently relied on in support of a claim for nearly 25% full-time integration.

But both of Metro's integrated principals, Jones and Heinlein, have lengthy broadcast experience and one is a local resident.¹⁹ Further, Jones will be the general manager of the proposed station, a position which assures him a major role in management. While Mid-Ohio would seem to have some margin of superiority in these qualitative areas of comparison, they are clearly secondary considerations, the primary emphasis being on quantitative integration that is full time in nature. Merrimack Valley Broadcasting, Inc., 92 F.C.C. 2d 507, 514 (Rev. Bd. 1982). Since Metro proposes more than twice as much full-time integration as Mid-Ohio, an amount that in this case represents a majority of the shares held in the corporation, it is awarded a preference in this area of comparison notwithstanding Mid-Ohio's considerable part-time integration and a moderate preference for its enhancing qualitative considerations.

Summation

17. No preference has been found for diversification of media ownership interests. The past record of WBBY(FM) is regarded as warranting neither a preference nor a demerit. Metro has been found superior in terms of integration of ownership with management.

Accordingly, IT IS ORDERED that unless an appeal from this Initial decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Metro Broadcasting, Inc. IS GRANTED, and the application of Mid-Ohio Communications, Inc. IS DENIED.

John H. Conlin
Administrative Law Judge
Federal Communications Commission

¹⁹ The other, though not residing in the service area of the Westerville station, is a long-time resident of another Columbus suburb.

²⁰ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Appendix C

Before the
Federal Communications Commission FCC 85D-75
Washington, D.C. 20554 1580

In re Applications of)	
)	
MID-OHIO)	BC DOCKET NO. 82-282
COMMUNICATIONS, INC.)	File No. BRH-790601F6
)	
For Renewal of License of)	
Station WBBY(FM),)	
Westerville, Ohio)	
)	
For Construction Permit)	

Appearances

Lee W. Shubert, Esq. and Richard M. Riehl, Esq. on behalf of Mid-Ohio Communications, Inc. and Larry A. Miller, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: December 18, 1985; Released: December 23, 1985

Preliminary Statement

1. One June 1, 1979 Mid-Ohio Communications, Inc. (Mid-Ohio) filed an application for the renewal of the license of Radio Station WBBY(FM), Westerville, Ohio. On September 4, 1979 an application for a construction permit for the same facility was filed by Metro Broadcasting, Inc. (Metro). By a Memorandum Opinion and Order, released June 1, 1982, 90 FCC 2d 114 (1982), the applications were designated for a

comparative hearing.¹ A hearing was held from November 16 through 18, 1982, and on September 16, 1983, an Initial Decision (ID) was issued in which the application of Mid-Ohio was denied and that of Metro was granted.

2. Exceptions to the ID were taken by the parties, and on November 2, 1983 Metro filed a motion to reopen the record and to enlarge the issues. Metro's motion requested the enlargement of the issues against Mid-Ohio to examine whether Mid-Ohio had failed to "report the abandonment of a principal's intergation proposal . . . and misrepresented . . . the facts of its principal's employment . . . " Motion at p. 16. Following the usual exchange of pleadings, the Review Board on June 15, 1984 added the following issues with respect to Mid-Ohio and Metro:

To determine whether Mid-Ohio Communications, Inc. violated Section 1.65 of the Commission's rules by failing to report the changed employment status of Richard P. Nourse, or during the hearing misrepresented the facts regarding his employment plans, and the effect thereof on Mid-Ohio's basic or comparative qualifications.

To determine whether Metro Broadcasting, Inc. failed to submit complete and accurate information regarding its corporate documents, stock ownership and financial qualifications in violation of the Commission's filing, reporting and candor requirements, and the effect thereof on Metro's basic or comparative qualifications.¹²

¹ In the order designating the applications for hearing, the Commission also granted its consent to the transfer of control of mid-Ohio. On March 14, 1980, QNP Corporation (QNP), the transferee had filed an application for transfer of control from William R. Bates, the transferor. Prior to the transfer, Mr. Bates has owned 50.1% of the stock of Mid Ohio, QNP had owned 25% and Richard Nourse 24.9%. 90 FCC 2d at 115. The grant of the transfer authorized QNP to assume Mr. Bates' stock.

² Mid-Ohio Communications, Inc., 56 RR 2d 238 (1984).

3. On December 20, 1984 Mid-Ohio and Metro filed a settlement agreement and Joint Request for Approval of Agreement. That agreement was supplemented and amended on June 19, 1985. The settlement agreement, as supplemented, provided for the dismissal of Metro's application in return for a monetary payment by Mid-Ohio. By a Memorandum Opinion and Order (FCC 85M-2618) released June 26, 1985, the settlement agreement was approved and Metro's application was dismissed with prejudice, thereby mooted the issue specified against Metro. Metro's burden of proceeding with the introduction of evidence on the remaining issue was assumed by the Mass Media Bureau.

4. Hearing conferences were held on July 25, 1984; September 24, 1984; February 19, 1985; April 23, 1985; and June 14, 1985. Written direct cases were exchanged on June 24, 1985. The hearing convened in Washington, D.C. on July 23, 1985 and continued through July 26. The record was closed on that date. Proposed findings and conclusions were filed on October 3, 1985 and replies thereto were submitted on October 24.

Findings of Fact

Mid-Ohio's Representations Concerning Richard P. Nourse.

5. Richard P. Nourse is Vice President, a director and holder of 24.7% of the stock of Mid-Ohio. In "Answers and Objections to Interrogatories" filed by Mid-Ohio on September 1, 1982 (Answers), Mid-Ohio stated that Richard Nourse was and would be station manager at WBBY, that he spends forty (40) hours or more per week on station affairs, and that he "assists the General Manager in overseeing the day-to-day operations of . . ." the station. Mid-Ohio stated that Richard Nourse would occupy the position indefinitely from September 1, 1982 and noted that while he had worked at Pioneer Chevrolet in Marietta, Ohio during the summer, he "no longer works at Pioneer Chevrolet." Answers, pp. 7-8.

6. Later, on October 25, 1982, Mid-Ohio supplemented its interrogatory answers (Supplemental Answers) to indicate that

the amount of time Richard Nourse had devoted to station affairs had "varied since September 1, 1982." Mid-Ohio also indicated that at the time of the supplement Richard Nourse "devotes 40 hours or more per week" to the station and intended to maintain that time commitment after Mid-Ohio's application was granted. Supplemental Answers, p. 1.

7. The comparative hearing on the applications of Mid-Ohio and Metro was held in Columbus, Ohio on November 16, 17, and 18, 1982. As part of its direct case, Mid-Ohio submitted the written testimony of Richard Nourse which states in pertinent part as follows:

As Station Manager for the station, Mr. Nourse assists the General Manager in overseeing the day-to-day operations of WBBY(FM). His responsibilities include assisting in the management of the station's business affairs, conducting personnel interviews, doing market research, overseeing EEO compliance, maintaining the station's "payola" file and assisting in the sales area. He is also in charge of public affairs and station maintenance.

Richard P. Nourse devotes 40 hours or more per week to his work for Mid-Ohio and WBBY(FM) and to QNP's investment in Mid-Ohio. He proposes to continue this time commitment to the station.

During the summer of 1982, Mr. R. Nourse worked as Acting General Manager of Pioneer Chevrolet in Marietta, Ohio. In this position, he oversaw the company's budgeting, floor plan controls, advertising campaigns, and business affairs.

Mid-Ohio Hearing Exhibit No. 2, p.9-10. At the hearing Richard Nourse sponsored his written testimony and swore that the statements contained therein were "true and correct to the best of his knowledge and belief." Tr. 160. There was no cross-examination of Richard Nourse with respect to the content of his written testimony, nor was he questioned concerning the responses to interrogatories.

8. Following the conclusion of the hearing and the closing of the record, Mid-Ohio submitted its Proposed Findings of Fact and Conclusions of Law, as well as its Reply to Proposed Findings of Fact and Conclusions of Law, as well as its Reply to Proposed Findings of Fact and Conclusions of Law. In the latter document, which was tendered to the Commission on January 25, 1983, Mid-Ohio argued that Carl C. Nourse, Mary P. Nourse and Richard P. Nourse "are fulfilling their commitments to the station at the present time." Reply Findings, p. 15; emphasis in original. The arguments were submitted in opposition to accusations by Metro that the integration commitments of the Nourses were not to be relied upon.

9. On September 16, 1983, an Initial Decision adverse to Mid-Ohio was issued; and on October 17, 1983 Mid-Ohio filed its exceptions and supporting brief, stating therein that Richard Nourse was working full-time as station manager. Exceptions, p. 16.³ Mid-Ohio stated that Richard Nourse "has been assisting the General Manager in all areas of station operation," and that he and his mother, Mary P. Nourse, "have been devoting more than forty hours per week to station affairs." Exceptions, p. 17.

10. Shortly after the filing of the parties' exceptions to the ID, Metro filed its motion to reopen the record and to enlarge issues, alleging that Richard Nourse no longer worked at the station. Mid-Ohio filed its opposition on November 16, 1983 and with it a statement, dated November 14, 1983, from Richard Nourse which indicates that he had been working for Pioneer Chevrolet-Cadillac, Inc., Marietta, Ohio but throughout, with some variations, had continued to "work between 30 and 40 hours per week on matters related to the operation of WBBY(FM). Opposition, Attachment A., p. 3.

³ The Initial Decision did not credit the integration of Richard Nourse because he was not an owner at the time of the "B" cut-off. I.D., Conclusions 13-16.

11. Richard Nourse was responsible for preparing the notes for the attorneys in connection with the "Answers and Objections to Interrogatories" which were filed by Mid-Ohio on September 1, 1982. The actual "Answers" were prepared by Mid-Ohio's attorneys. As of September 1, 1982, the date the document was filed, the representations contained in the "Answers" concerning Richard Nourse's time commitments and his involvement with Mid-Ohio, WBBY and QNP were correct. Tr. 1361.

12. Richard does not recall why the October 25 "Supplemental Answers" were filed, though he is sure he was consulted by his attorneys regarding them. He assumes that the language about his time commitment having varied "since September 1, 1982," was a reference to the time he had been spending in Marietta. He reviewed the "Supplementary Answers" prior to the time they were filed and testified that he believed the representations concerning his involvement with WBBY were true and correct as of the date they were filed with the Commission. Mid-Ohio Ex. No. 1-R, pp. 11-12; Tr. 1364.⁴

13. Richard Nourse reviewed his 1982 direct case testimony prior to the time it was submitted to the Commission and stated that he believed it to be true and correct. Tr. 1365. He appeared at the evidentiary hearing in November 1982 to sponsor his written case exhibit. The statements contained in his direct testimony, he believed, were true at the time he took the witness stand. He recalls being coached by the attorneys as to the response he should give if there were questions about his involvement with Pioneer. He remembers being told to state what he was doing at Pioneer, if asked about it. Mid-Ohio Ex. No. 1-R, pp. 11-12. Richard Nourse was not questioned by Metro's attorney, and the Bureau was not represented at the hearing.

⁴ The "R" in the above citation and others which follow is used when reference is made to Mid-Ohio's exhibits in the remand proceeding as opposed to those submitted during the original hearing.

14. Richard does not recall, nor is he aware of any reason, why his involvement at Pioneer was not expressly brought before the Commission prior to the time Metro filed its Motion to Enlarge Issues. He does not recall anytime when it was decided that the information concerning his Marietta involvement should not be reported to the Commission. He testified that he and his family were relying upon their attorneys to conduct the case properly, and therefore relied upon the attorneys' judgment in handling the matter. Mid-Ohio Ex. No. 1-R, p. 13.

15. Relative to Mid-Ohio's "Reply to Proposed Findings and Fact and Conclusions of Law," filed January 25, 1983, Richard Nourse recalls reviewing Mid-Ohio's document before it was filed with the Commission by Mid-Ohio's attorneys, but does not remember making any changes or corrections to the document. He relied upon counsel to prepare such documents and testified that he had no objection to the language describing his involvement with WBBY because he believes he was devoting approximately 40 hours per week to the affairs of the station. Mid-Ohio Ex. No. 1-R, pp. 13-14.

16. The statement made by the attorneys in the Exceptions filed on October 17, 1983 that Richard Nourse was actively assisting the general manager in all areas of station operation and that both Mary and Richard Nourse were devoting 40 hours per week to the station's affairs was, according to Richard's testimony, a true statement at the time it was made. The attorneys were aware that Richard Nourse was filling in at Pioneer Chevrolet-Cadillac on a two-to-three-day-per-week basis, and Carl Nourse was advised by attorneys at Hogan & Hartson, which represented Mid-Ohio at the time, that it was not necessary to report Richard Nourse's activities at Pioneer because he was keeping his commitment to the station. Mid-Ohio Ex. No. 2-R, p. 9.

17. As to his statement that was attached to Mid-Ohio's November 1983 opposition to the petition to enlarge issues, Richard Nourse reviewed the statement just before it was filed and testified that it was accurate; that he was committed to

spending 40 hours a week on the station's affairs, and that as of November 16, he was working approximately 30 hours a week on the affairs of WBBY. Tr. 1330.

18. An assessment of these claims requires an examination of the evidence regarding Richard Nourse's employment at Pioneer Chevrolet and the extent of his concurrent involvement on the affairs of WBBY. These are described in the succeeding sections of this decision.

Richard Nourse's Involvement with Pioneer Chevrolet-Cadillac

19. Sometime in June 1982, shortly after approval of the transfer of control of Mid-Ohio from William Bates to QNP, Richard Nourse began working at WBBY. QNP is a family company which owns the businesses in which the Nourse family is involved. In June 1982 the businesses included several automobile dealerships, including Quality Chevrolet in Columbus, Ohio, and Pioneer Chevrolet-Cadillac, Inc., Marietta, Ohio, as well as Windsong Tennis and Country Club, Inc., Worthington, Ohio. Mid-Ohio Ex. No. 1-R, pp. 2-3. QNP is owned by Carl and Mary Nourse, Richard's father and mother.

20. Richard's employment at the station came shortly after Carl Nourse received a letter from Hogan & Hartson advising him of steps to be taken, following the Commission's consent to the transfer of control of Mid-Ohio to QNP, to prepare for the upcoming hearing.⁵ One of the recommended actions was to immediately install Richard as the Station Manager of WBBY and to assign him duties relating to programming and the day-to-day operations of the station. Mid-Ohio Ex. No. 2-R, p. 1.

21. At about the same time, however, Carl Nourse decided that Richard was needed to "baby-sit" on a part-time basis, the business of Pioneer Chevrolet-Cadillac in Marietta, Ohio.

⁵ The Order approving the transfer also designated WBBY's renewal application for a comparative hearing.

Although the dealer of record was Paul Aselin, and Carl Nourse was formally only a "financial participant" in the business, Carl Nourse in fact owns and controls Pioneer. Mid-Ohio ex. No. 1-R, p. 6, Tr. 1157.

22. Richard Nourse was sent to Marietta for several reasons: First Aselin had produced a feature-length motion picture and had reached the point where it was necessary for him to complete the film's editing and dubbing and to find a distributor. In addition he was at the time having domestic problems and desired to spend some additional time with his family. Mid-Ohio Ex. No. 1-R, p. 6, Tr. 1105. At the time Pioneer was only marginally profitable; sending Richard Nourse to Marietta was advantageous because it provided his father with management representation with no addition to the dealership's payroll. Mid-Ohio Ex. No. 2-R, p. 2, Tr. 1105.

23. Richard Nourse was to oversee the business in Aselin's absence, assisting with relatively routine tasks relating to the business — dealing with banking institutions, signing checks, accounting, etc. Mid-Ohio Ex. No. 1-R, p. 6, Tr. 1105. At the time Pioneer was only marginally profitable; sending Richard Nourse to Marietta has advantages because it provided his father with management representation with no addition to the dealership's payroll. Mid-Ohio Ex. No. 2-R, p. 2, Tr. 1105.

24. Richard Nourse travelled to Marietta approximately twice a week, typically on Tuesdays and Fridays, to oversee the business. The driving time between Marietta and Westerville is approximately two hours and fifteen minutes. The distance is approximately 120 miles. Richard Nourse would attempt to go to Marietta in the morning and return to the Westerville area that same evening. He worked at Pioneer in this capacity until September 1, 1982, at which time Mr. Aselin returned.

25. In mid-September 1982, Richard Nourse was asked by his father to return to Pioneer so that Aselin could resume efforts to sell his movie. A further problem had also developed at Pioneer because, upon Mr. Aselin's return at the end of August 1982, a conflict developed between him and a key employee resulting in the latter's resignation. Thus, on his return to Pioneer, Richard's duties and responsibilities were expanded to include operations with the service and parts department and with the body shop. Richard Nourse tried to coordinate those departments and, as he had done before, oversee the financial operations

of the dealership. Mid-Ohio Ex. No. 1-R, p. 9. From October 1982 until the end of the year, he continued to spend about two days per week at Pioneer. He had no fixed schedule at Pioneer, his duties consisting essentially of supervising the financial affairs and the operations of departments over which he had authority.

26. In January 1983, Richard Nourse began spending three days per week at the dealership. This included one one-day round-trip between Marietta and Westerville and another trip which involved an overnight stay in Marietta. He maintained the three-days-a-week schedule in Marietta for most of 1983.

27. On October 29, 1983 Richard got married, and at the end of November he ceased commuting to Marietta, moving into a condominium there with his wife.

28. Richard Nourse is, at present, the general manager of Pioneer Chevrolet-Cadillac. He spends 35 to 40 hours per week at Pioneer and does not currently spend much time with WBBY. In a sense, his status is temporary because Carl Nourse could ask him to go back to WBBY at anytime, and because Chevrolet, which reserves the right to have a general manager removed on 48 hours notice, has urged Carl Nourse to have Paul Aselin assume his old position. Tr. 1148, 1257-58.

29. By December 1984, during the course of preparing for the taking of the depositions in connection with this latest phase of WBBY's renewal proceeding, Richard Nourse, according to his testimony, realized that his desire to be the station manager at WBBY had waned and that if the WBBY license was renewed, he did not want to be obligated to occupying this position. Among the factors influencing his change of mind were his marriage in October 1983, and the hiring of Dan Morris as general manager at WBBY in November 1983. Mid-Ohio Ex. No. 1--R, p. 15, Tr. 1259-60. Morris is a veteran broadcaster in whom the owners have full confidence and once he became familiar with the WBBY operation, Richard and his wife established a residence in Marietta where she is now employed. In addition, improvement in the automobile business has required more involvement by Richard in the affairs of the dealership. In sum, if Carl Nourse asked Richard Nourse to serve as station manager of WBBY, Richard would do so, but his interest in broadcasting is less than it was in 1982 when he made his original commitment to work at the station.

30. From June 1982 until the end of the year, one-half of Richard Nourse's salary was paid by Windsong, the other half was paid from the operating account at Quality Chevrolet. Mid-Ohio Ex. No. 1-R, p. 9, Tr. 1105. Presently his salary is paid entirely by Pioneer. The changeover occurred in July 1983. At no time has Richard Nourse ever been on the Mid-Ohio payroll. Mid-Ohio Ex. No. 1-R, p. 11, Tr. 1227-28.

Participation by Richard Nourse in the Affairs of WBBY.

31. The record in the original proceeding with regard to Richard Nourse's work at Pioneer Chevrolet states only that he served as acting general manager during the summer of 1982 (Mid-Ohio Ex. No. 2, p. 10).⁶ Further, his testimony at the original hearing was that he devoted 40 hours per week to performing various tasks at WBBY and intended to continue doing so. It is Mid-Ohio's position that notwithstanding his activities at Pioneer Chevrolet, Richard Nourse also performed tasks for WBBY during the relevant time period that put him in substantial compliance with his representations at the hearing.

32. There is no documentary evidence either supporting or contradicting this claim.⁷ The evidence therefore consists entirely of testimony: Bryan McIntyre, Carl Nourse and Richard Nourse describing Richard's activities on behalf of WBBY and David Freedman maintaining that his alleged functions were minimal or non-existent. The testimony is frequently less than specific, particularly regarding the time frame and the amount of time that was actually devoted to the tasks being described. The discussion of which follows is organized chronologically to the extent permitted by the state of the record.

33. June-August 1982. On June 10, 1982 Bryan McIntyre was hired as a consultant for WBBY by Carl Nourse. Tr. 733, 1245-46. Initially he worked as a liaison between Carl Nourse and Hogan & Hartson, as well as between Carl Nourse and

⁶ Responses to interrogatories filed September 1, 1982 stated (p. 8) that he "no longer works at Pioneer Chevrolet."

⁷ During the fall of 1982 Richard Nourse kept a diary or log describing the tasks he was performing for WBBY. However, the entries were apparently so confusing that the document was not offered as evidence by either Mid-Ohio or the Bureau. Tr. 1233-1236.

the WBBY staff. Mid-Ohio Ex. No. 3-R, p. 1, Tr. 1245-46. Carl Nourse was McIntyre's boss and McIntyre answered directly to him. Tr. 745. McIntyre compiled material for the hearing and assisted in the preparation of some documents by providing information to the attorneys. He also reviewed documents which had been prepared by Hogan & Hartson for completeness and accuracy. Tr. 734.

34. McIntyre's office was next door to Carl Nourse's office at Quality Chevrolet, and he saw Carl Nourse daily. McIntyre functioned as the "ears" or the "front man" for the Nourse's and regularly reported to Carl Nourse on what was happening at the station. Tr. 745, 746. In addition he began training Richard Nourse to be Station Manager at WBBY, a position in which Richard would be working with the station Manager at WBBY, a position in which Richard would be working with the station's Public File, its EEO plan, its sales operations and with its programming. Mid-Ohio Ex. No. 3-R, p. 2; Tr. 742. The title of station manager was assigned to Richard Nourse at the suggestion of Hogan & Hartson. At the time, the person at WBBY with the title of general manager was David R. Freeman, a former sales manager at WBBY. Mid-Ohio Ex. No. 1-R, p. 2, Tr. 1236.

35. As Richard Nourse's mentor, McIntyre worked on a regular basis with him. About three times a week they would meet and go over station affairs. Sometimes McIntyre and Richard Nourse would go to the business offices in Westerville or the studios in Sunbury to review various projects on which they were working. Mid-Ohio Ex. No. 3-R, p. 3.

36. Much of Richard Nourse's initial association with McIntyre consisted of the latter explaining to Richard what McIntyre was doing at the station. To the best of Richard Nourse's recollection, the first task he performed at WBBY in June 1982 was to establish certain personnel procedures and policies. In addition, he was involved with planning for the upgrading of WBBY's equipment and facilities. At the time the Commission approved the transfer of control of QNP, WBBY seemed to be experiencing a regular turnover in sales personnel. Richard Nourse recalled that one of his projects was to try to find the cause for the turnover. He worked on pay programs for sales personnel, trying to make the programs more conducive

to keeping sales personnel at the station. He was not involved with making sales calls. Mid-Ohio Ex. No. 1-R, p. 2, Tr. 959-62, 1351-54, 1389-90.

37. Richard also worked with McIntyre on the preparation of an employee manual which attempted to codify such things as paid insurance, vacation and sick leave policy, etc. Mid-Ohio Ex. No. 3-R, p. 4. Another duty assigned to him was the supervision and maintenance of the station's Equal Opportunity Employment Compliance File and the Payola File. Neither of the tasks took much time, because both could be accomplished by organizing the station's files. Thereafter, the files were essentially self-sustaining. Mid-Ohio Ex. No. 1-R, p. 3, Tr. L782, 875, 888-90. Mid-Ohio Ex. No. 2-R, p. 5.

38. Richard Nourse was also responsible for the development of a computer program which interfaced with the operation of the radio station and monitored on a daily basis the status and progress of all the family businesses. Tr. 2241-43. The computer project began in the early summer of 1982, and Richard Nourse spent many days on the project over a five month period. Tr. 1161. The problem was the Nourses needed a computer which would handle all of the family's businesses - the radio station, the auto dealerships and the tennis club. No such program was available. Tr. 1394. Richard Nourse worked with Reynolds & Reynolds, a computer company, to develop the program to meet the Nourse's needs. Tr. 1395. He also attempted to develop a computer program which would program WBBY's music, based upon the music card catalogue which had been developed; the program could not be implemented, however, due to hardware limitations which made the software program impractical. Tr. 1397.

39. Once QNP assumed control of WBBY, management meetings were held on a weekly basis. Richard Nourse attended most of the meetings held during the summer of 1982.

40. After beginning as a station manager trainee, Richard Nourse assumed the title and position of Station Manager about August 1982, when press releases were sent out naming him to the position. Mid-Ohio Ex. No. 3-R, p. 2.

41. September-December 1982. This period encompasses the time during which the answers to interrogatories were filed, the exhibits exchanged, and the hearing conducted. It is also the period in which Richard Nourse resumed his two day per week visits to Marietta (para. 25 supra).

42. During September 1982 Richard Nourse spent five to seven hours each week working on maintenance at the station. Mid-Ohio Ex. No. 1-R, p. 2 Tr. 1143. When QNP assumed control of Mid-Ohio, the station's physical plant was in poor condition. The studio was located in Sunbury, Ohio in a corn field. A long gravel driveway leading to the building, was strewn with pot holes. Brush had grown up around the building and the area was littered with trash. With Richard Nourse's participation and supervision, the studio was completely renovated. Mid-Ohio Ex. No. 3-R, p. 4, Tr. 782, 914.

43. Richard Nourse did little or no "on-air" work at WBBY. In September 1982, however, he became involved and worked with Tim Hodges, the station's program director, on concepts for revamping the programming at WBBY. His efforts were focused on developing a format which would provide a suitable transition of musical selections from morning to late evening within the overall jazz format of the station. Mid-Ohio Ex. No. 1-R, p. 3. During September and October he surveyed people concerning their jazz music preferences, and based upon these surveys sought to develop a list of songs which might be the foundation for the station's programming. It was the Nourse family's belief the WBBY should broaden its base on listeners to include more than just jazz enthusiasts. The surveys, therefore, attempted to determine community tastes regarding various forms of jazz, so that programs could be developed that would better reflect those interests. Mid-Ohio Ex. No. 1-R, p. 4, Tr. 941-44, 1341-45, 1459.

44. The format formulated by Richard Nourse called for "cycling" of music--a schedule of mood changes throughout the day-parts. The identification of different, more mass-appeal-type music, led to the cataloging of music at the station. Tr. 947. There were 20,000 albums with eight to ten cuts each to be catalogued, and the process ran for nine or ten months through the fall of 1982 and the spring of 1983. Tr. 863, 946. Richard Nourse personally typed the catalogue cards, along with the other Nourse family members. Tr. 770, 944-47

45. Mr. McIntyre and Richard Nourse also collaborated on the refunding of money to people who had sought to join what was called the "Jazz Ambassadors Club," a promotional device initiated by Ken Bates, the former General Manager of the station and son of Bill Bates. The idea was to enroll listeners in a "club" which was supposed to provide benefits such as a regular newsletter, discounts at client locations, drawings for concert tickets, and the like, in return for an \$18.00 payment. The Nourses decided to refund the money to those listeners who had paid the membership fee, a project which took considerable time. It was during the fall of 1982 that the station actually got the form letter together and determined to whom the refunds should be sent. Mid-Ohio Ex. No. 3-R, p. 6.

46. Richard was also involved in the hiring of announcers George Cobb and Bob North. Richard Nourse, Bryan McIntyre and Carl Nourse met with Mr. North several times before he was actually hired. Richard Nourse prepared the employment agreement for Mr. North and he was hired. Richard Nourse prepared the employment agreement for Mr. North and he was hired as the morning announcer. Mid-Ohio Ex. No. 3-R, p. 6.

47. With the increase in his duties at Pioneer Chevrolet Richard Nourse's attendance at the weekly WBBY management meetings dropped off. During the fall of 1982 he was present at somewhat more than one-half of the meetings. Tr. 965-906; 976.

48. January 1983 and Thereafter. By this time the original hearing had been completed and the record closed. Proposed findings were filed in December 1982 and replies in January 1983. In January Richard Nourse began spending three days each week in Marietta. However, he continued to perform various functions for WBBY.

49. Near the beginning of 1983 Richard Nourse was involved with the relocation of WBBY's studios, so the studios would be co-located with the station's business offices. At the time QNP assumed control of the station, WBBY's studios were located at the transmitter in Sunbury, approximately 12 miles from Westerville. Richard and Bryan McIntyre spent a significant amount of time planning the conversion of conventional office space into a broadcast studio. Mid-Ohio Ex. No. 1-R, pp. 4-5, Tr. 775.

50. It became known in December 1982 that the company which had been leasing the front part of the second floor of the building where the sales office was located planned to vacate its space as of March 1, 1983. Richard Nourse worked with McIntyre on plans to utilize this space for receptionist's area, studio space, a conference room, a music library, etc. Richard personally drew up the plans for allocating space for these activities. He was also responsible for the design of the studio. Tr. 1145. Mid-Ohio Ex. No. 3-R, p. 7. From January 1983 through the time the studios were moved from Sunbury to Westerville, McIntyre saw Richard Nourse almost daily except on the days he was in Marietta. Tr. 979-980.

51. Richard Nourse was also responsible for finding alternate space for the sales offices and studios. This involved resolving a zoning problem, a project which extended over a three month period. He also worked on the project with architects for about one and a half hours per day for a period of approximately six weeks. Tr. 1162-1164. ⁸

52. Richard also spent time with McIntyre in connection with certain engineering matters at the station. These pertained to the selection and ordering of new equipment for the new studios when the studios were moved from Sunbury, and was essentially a learning experience for Richard, involving such things as determining which equipment was superior and which the station could afford. Mid-Ohio Ex. No. 1-R, p. 5. Richard Nourse was involved with the decision-making for the lease of two Ampex reel-to-reel tape machines and a new telephone system for the Westerville office. He also worked with McIntyre in connection with the acquisition of a new transmitter for the station. After they met with equipment sales representatives, McIntyre made the recommendation as to which transmitter to buy and Richard Nourse was involved with the lease aspects of the transaction. Mid-Ohio Ex. No. 3-R, p. 5, Tr. 951-53. Richard negotiated the lease agreement for the equipment which was ultimately acquired for the station. Mid-Ohio Ex. No. 1-R, p. 5.

⁸ These figures are rough estimates provided by Bryan McIntyre and presumably excluded those days that Richard was in Marietta.

53. From the time QNP assumed control of WBBY, Richard Nourse was involved in an ongoing search for a manager to replace Mr. Freeman. In early 1983, he participated in extensive negotiations with James Pidcock regarding the position of general manager at WBBY. Mr. Pidcock was then employed by Taft Broadcasting in Tampa, Florida. A great deal of time was spend by Richard trying to familiarize Mr. Pidcock with th station's operation in order to avoid an extensive post-hiring orientation period. Their discussions extended over a six month period but in the end Pidcock was not employed. Mid-Ohio Ex. No. 1-R, p. 4; 2-R, p. 5; 3-R, p. 6.

54. During February and March 1983 Richard Nourse's attendance at management meeting dropped off some. After February or March 1983, he attended approximately one-third to one-fourth of the meetings through June 1983 when his attendance decreased further. Tr. 978.

55. In addition to the foregoing activities, there is testimony more general in nature regarding Richard's concern and involvement with WBBY despite the two or three days per week he spent in Marietta. Richard and Bryan McIntyre had frequent telephone discussions about the affairs of WBBY when Richard Nourse was in Marietta. McIntyre would call Richard Nourse at Pioneer and Richard Nourse would call Mr. McIntyre at Quality Chevrolet. Most of the conversations related to coordinating their activities on station projects in which the two were involved. Mid-Ohio Ex. 3-R, p. 8.

56. Richard also usually worked weekends on station affairs. Some work was also done at his parent's house when he would visit them during his days in Columbus and discuss station affairs with his father.⁹ From January until the end of October 1983, according to his testimony Richard Nourse spent approximately 36 hours per week at Pioneer. Of that time, it was not unusual that ten to fifteen hours were devoted to the affairs of WBBY. It was typical for Richard Nourse to work 60 hours per week during this period. Mid-Ohio Ex. No. 1-R, pp. 10-11. The station business which Richard Nourse carried

⁹ As discussed infra, Carl Nourse as Mid-Ohio's president was closely involved in station affairs and was for a substantial period the de facto general manager

on from Marietta involved projects such as the creation of song listings, policy and procedure manuals, etc. Mid-Ohio Ex. No. 1-R, p. 11.

57. Testimony of David Freeman. The foregoing findings are based on the testimony of Brian McIntyre, Richard Nourse and Carl Nourse. This evidence was disputed by David Freeman, who was called as a witness by the Mass Media Bureau and who maintained that it considerably exaggerated Richard's participation in station affairs. David Freeman had been hired in 1978 as a sales manager for WBBY. When QNP (the Nourses) acquired control in June 1982 Freeman was named general manager of the station. He remained at WBBY until November 1983.

58. Freeman's testimony can be summarized as follows: He stated that to his knowledge Richard was not involved in personnel decisions (Tr. 623) and had no knowledge that Richard ever interviewed any sales applicants. He did recall that Richard once suggested that a larger sales staff be hired. Tr. 624, 651. During the period that Freeman was at WBBY, he saw Richard at the station fewer than half a dozen times. Tr. 625. Freeman never saw Richard at the Sunbury studios but did see him several times at Quality Chevrolet. Tr. 626. Freeman only recalled seeing Richard at two management meetings after June 1982. Tr. 628. Freeman was not aware of any market research that Richard had done (Tr. 641) and considered Bryan McIntyre to be generally responsible for the EEO file and Payola file. Tr. 642-3. To Freeman's knowledge, Richard was not responsible for station maintenance although he was told by Carl that "the boys" cleaned up the Sunbury studio. Tr. 647-8. The concept of different music by different day parts evolved over a period of time with Hodges and McIntyre having the most input. Tr. 657-8. Although Richard did suggest some songs and albums, his suggestions were not implemented. Tr. 660. The station's logo was changed to "The Entertainment Alternative" based on suggestions made by Richard, although he did not suggest that particular logo. Tr. 666-8. To Freeman's knowledge, Richard was not involved in the selection of equipment. Tr. 661-3.

59. Though the presiding officer does not doubt Freeman's essential veracity, greater weight has been given to the testimony of Bryan McIntyre as to Richard Nourse's participation in station affairs.¹⁰ First of all McIntyre had been specifically assigned the task of working with Richard and familiarizing him with the operation of a broadcast station. Secondly, until some time 1983 the geographic configuration of the WBBY operation was such that it would be difficult for Freeman to account for many of the activities attributed to Richard with any degree of certainty. The business office was located in Westerville, the studio and transmitter were about 12 miles away in Sunbury, and other offices were maintained at Quality Chevrolet for Carl Nourse and McIntyre. In addition, throughout the period of time in question Richard had an office at the Windsong Tennis and Country Club, a family owned enterprise he had managed until 1982. Freeman's day-to-day activities, on the other hand, were centered largely at the business offices in Westerville since his primary activity involved sales. Tr. 616-617, 745, 1405. Thirdly, as described below, Freeman's position at the station was always tenuous, and there is little reason to believe that he would be fully informed regarding Richard's activities.

60. When the Commission granted the transfer of control of Mid-Ohio to QNP, the Nourse family felt compelled to replace the then general manager, Ken Bates. Ken was the son of Bill Bates, from whom control of Mid-Ohio had been wrested as the result of a legal battle between the elder Bates and QNP. Freeman had been the sales manager for WBBY, and due to his experience at the station and first-hand working knowledge of WBBY's sales operation, it was decided to name him general manager so as to provide a smoother transition in the management of the station. From the outset, however, the Nourses regarded this as an interim arrangement. Mid-Ohio Ex. 2-R, p. 7. Although holding the title of general manager, he was viewed as being primarily responsible for sales (Tr. 168) and the search for a new general manager commenced almost immediately after the transfer of control took place.

¹⁰ Like Freeman, McIntyre is no longer an employee of WBBY. He is presently the Program-Operation's Manager at WPTF Raleigh, North Carolina.

Mid-Ohio Ex. No. 1-R, pp 16-17; Tr. 749-52. Consequently, Richard Nourse felt no obligation to report to Freeman and regarded Bryan McIntyre as the staff member with whom he should develop a working relationship. During this period Richard recognized his father as the de facto manager of WBBY, as did Bryan McIntyre and Carl Nourse himself (Tr. 1127, 1129).

61. For all of the foregoing reasons, the presiding officer regards McIntyre as being more knowledgeable regarding Richard's activities and his testimony, therefore, more reliable than Freeman's.

Conclusions of Law

62. The sole issue to be resolved is the one added by the Review Board against Mid-Ohio:

2(a) To determine whether Mid-Ohio Communications, Inc. violated Section 1.65 of the Commission's rules by failing to report the changed employment status of Richard P. Nourse, or during the hearing misrepresented the facts regarding his employment plans, and the effect thereof on Mid-Ohio's basic or comparative qualifications.

The issue has two aspects: (1) whether Mid-Ohio violated Section 1.65 of the Commission's Rules by failing to report the changed employment status of Richard Nourse; and (2) whether Mid-Ohio or Richard Nourse misrepresented facts regarding Richard Nourse's employment plans during the hearing.

Section 1.65 Issue

63. Section 1.65 of the Commission's Rules requires applicants for Commission authorizations to report substantial changes in matters of decisional significance.¹¹ The function of the Rule is to ensure that the information reported in applications remains substantially accurate and complete in all significant respects, Reporting of Changed Circumstances, 3 RR 2d 1623 (1964), and to ensure that fair administrative practice is observed in comparative hearing proceedings. See Allied Broadcasting Co. v. FCC, 435 F. 2d 68 (D.C. Cir. 1970).

64. The rule is intended to apply (i) "where there has been a substantial change and (ii) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest" Reporting of Changed Circumstances, *supra* at 1624. More specifically, applicants are obliged to report "any substantial change in circumstances pertaining to . . . factors urged as a basis for a grant or a comparative preference." *Id.* Excluding from the scope of the rule "minor changes which would have no significance" and even "some material matters [which] normally

¹¹ Specifically, the Rule states:

Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceeding involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47.

fluctuate on a day-to-day basis," the Commission characterized the intent of the rule as requiring disclosure of changed circumstances "which may make a difference from the standpoint of the public interest, and those which the Commission should be aware of in order to reach a realistic decision." 3 RR 2d at 1625 (emphasis added).

65. In this case Mid-Ohio argued that its integration of ownership with management was a highly significant factor favoring a grant of its application. Moreover, it stressed that, unlike Metro, its integration was not merely a proposal but something already in existence, since Carl, Mary and Richard Nourse were already performing the functions described in their direct case exhibit (Mid-Ohio Ex. 2), thus enhancing the credibility of their proposal. However, Mid-Ohio did not report the undisputed fact that from September 1982 onward Richard Nourse was spending two, and later three, days per week managing Pioneer Chevrolet in Marietta, Ohio, some 120 miles from Westerville. It was not until November 1983 when it filed its opposition to Metro's petition to enlarge issues raising the matter that Mid-Ohio disclosed Richard Nourse's employment at Pioneer Chevrolet.

66. Essentially, Mid-Ohio defends its conduct on the ground that Richard Nourse continued to devote 40 hours per week to the affairs of WBBY, so that his employment at Pioneer Chevrolet was not a substantial change of material significance to which Section 1.65 applies. This position must be rejected.

67. In the first place, the Rule specifically provides that applicants are "responsible for the continuing accuracy and completeness of information furnished . . . in Commission proceedings involving a pending application." In answers to interrogatories filed on September 1, 1982 Mid-Ohio represented that Richard Nourse 'no longer works at Pioneer Chevrolet.' This statement was accurate at the time it was made; but later that month he resumed his part time employment at Pioneer Chevrolet, and even now continues to work there. Mid-Ohio's obligation to correct the record in this respect seems obvious.

68. Moreover, Richard Nourse's changed circumstances was a critical factor in weighing his integration proposal. Where a representation is made that a principal will be integrated

on a 40 hour per week basis, other demands on his time are always relevant in determining the credibility of the proposal, particularly where they regularly involve travel outside the immediate area of the station. Metro Broadcasting, Inc., 97 FCC 2d 688, 701 (Rev. Bd. 1984) (fulltime integration credit not given where principal, a member of state legislative, spent two months per year at state capital); Berryville Broadcasting Co. 70 FCC 2d 1, 11-12 (Rev. Bd. 1978) (integration disallowed where principal resides and manages a station in a community located three hours round trip drive from community of license). Here Richard Nourse's weekly two to three day visits to a city some 120 miles from Westerville were clearly a factor to be considered in assessing the likelihood that his integration proposal could be implemented. The letter and spirit of Section 1.65 do not permit an applicant to determine unilaterally that such a matter is of no consequence and thereby remain silent. The rule requires disclosure of information that may make a difference and that the Commission ought to be aware of. It is for the Commission, not the applicant, to decide its ultimate importance to the case and to do so on the basis of a full record, including, if requested, cross examination by the competing application.¹²

69. The presiding officer therefore concludes that Richard Nourse's changed employment status was a matter of decisional significance since it was material to the ownership integration claimed by Mid-Ohio; and that the failure to report it constituted a violation of Section 1.65.

Misrepresentation

70. This aspect of the issue specified by the Review Board seeks to determine whether Richard Nourse 'during the hearing misrepresented the facts regarding his employment plans" Richard Nourse's testimony at the hearing consisted essentially of a confirmation that the statements about his hearing consisted essentially of a confirmation that the

¹² At the original comparative hearing Metro did not cross-examine Richard Nourse. It seems doubtful that this would have been the case had his renewed association with Pioneer been made known.

statements about him in Mid-Ohio Exhibit 2 (pp. 9-11) were true and correct.¹³ The statement that he assists the general manager is somewhat misleading since David Freeman was nominally the general manager. However, the record demonstrates that except for sales, his authority and activities were circumscribed and that irrespective of job titles Carl Nourse was managing the overall operation of WBBY. With this clarification the statment is not inaccurate.

71. The most controversial statement in the exhibit is the representation that Richard Nourse "devotes 40 hours or more per week to his work for Mid-Ohio" On the basis of evidence taken nearly three years after the fact it is difficult to determine with precision whether this statement was literally true at the time it was made. It is undisputed that Richard was spending two days a week at Pioneer Chevrolet in Marietta during the period in question (November 1982). The findings show, however, that after QNP assumed control of WBBY, Richard Nourse was involved in a variety of station related activities and that these activities were ongoing at the time he testified and continued thereafter. On balance the presiding officer concludes that there is substantial evidence to support the conclusion that Richard Nourse's participation in station affairs was sufficiently extensive to permit a good faith claim that during the course of the hearing he was devoting about 40 hours per week to station affairs.¹⁴

72. This is not to say that all of the endeavors recited in the findings would be cognizable for integration purposes. Some of his tasks, studio maintenance work for example, were not managerial in nature. Others, in particular telephone conversations from Marietta and discussions in the evening with his father about station affairs, do not involve the active day-to-day participation in station operation that is required for full-time integration credit. This matter is now moot, however, since the case is no longer a comparative proceeding. The issue

¹³ Those portions of the exhibit which are relevant to the issue are set forth at para. 7 of the Findings of Fact.

¹⁴ His participation waned during 1983 and by the time Metro's petition to reopen the record had been filed it had declined, by Mid-Ohio's own admission, to a minimum of 30 hours per week.

is one of misrepresentation, and it is evident from the record that the integration claimed for Richard Nourse was not fabricated by the applicant.

73. The real problem with Richard's testimony lies not in what he said but in what he didn't say. For the reasons already set forth with regard to the Section 1.65 issue, a candid description of Mid-Ohio's integration should have included mention of Richard Nourse's employment at Pioneer Chevrolet. It should be noted again that this case differs from the usual comparative proceeding in that Mid-Ohio's integration was not put forward as being prospective; rather it was touted as being already in place and thus more credible. Mid-Ohio had already represented in response to discovery that Richard Nourse's employment at Pioneer Chevrolet had ended by September 1982. In view of its failure to submit a written report of this change, it was surely incumbent on Mid-Ohio to include the matter as part of Richard Nourse's direct testimony. This would have corrected the record with regard to his status and would, presumably, have led to cross-examination and the development of a more complete record on the point.

74. Mid-Ohio's silence on the matter cannot be attributed to inadvertance since Nourse testified that his counsel was concerned about his reemployment at Pioneer Chevrolet. In fact, it is evident that a judgment was made not to volunteer the information but to respond truthfully in the event the matter arose. Para. 12, *supra*. In the circumstances, however, shifting the burden for revealing the matter to the competing applicant was plainly improper since Mid-Ohio had already informed Metro through discovery that Richard Nourse no longer worked at Pioneer Chevrolet. Thus, while it has been concluded that representations made during the hearing regarding Richard's employment at WBBY were not, strictly speaking, untrue, it must also be concluded that his failure to disclose his simultaneous employment at Pioneer Chevrolet was misleading and lacking in candor.

Ultimate Conclusion

75. The Section 1.65 issue and the misrepresentation question stem from the same cause: the applicant's failure to disclose that Richard Nourse was working part-time in Marietta while claiming to devote 40 hours per week to the affairs of WBBY. Though not necessarily negating Richard's integration credit, the time spent in Marietta was an awkward fact that might well have put his claim in doubt. Instead of the full disclosure which the Commission expects,¹⁵ Mid-Ohio opted to finesse the matter, remaining silent and rationalizing its reticence with the ipse dixit assertion that his additional employment was not relevant because, he was still fulfilling his commitment to WBBY. This was a serious error in judgment and one which does violence to the processes of the Commission. Plainly, the only proper course was disclose changed circumstance so that its effect could be tested at the hearing.

76. If this were still a comparative proceeding the record developed in this phase of the case would be sufficient to warrant a substantial comparative demerit. Bay Television, Inc. 85 FCC 2d 181, 185 (Rev. Bd. 1983). Even in a non-comparative context, there is some question whether renewal of WBBY's license should be granted. On balance, however, the presiding officer has concluded that denial of the application would be an action more severe than is warranted. Despite its several facets, the conduct in question amounted to what was in fact a single transgression: failure to disclose a material fact involving one aspect of its integration proposal. It was, moreover, mitigated by the fact that Richard Nourse continued to work at the stations and for most of the relevant time period was in reasonable compliance with the commitment made in Mid-Ohio's direct case exhibit regarding ownership integration. Thus, notwithstanding Mid-Ohio's failure to meet Commission standards regarding openness and fair dealing in the prosecution

¹⁵ Greenco, Inc. 39 FCC 2d 732, 736 (1973) (Commission must be able to rely on candor and honest dealing from its licensees). See also cases cited therein.

of its application, it is concluded that denial of the application for renewal of license is a more drastic action than the licensee's conduct warrants. Since there is no provision for consideration of a forfeiture, the censure expressed in the preceding paragraphs must suffice.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Mid-Ohio Communications, Inc. IS GRANTED.¹⁶

John H. Conlin
Administrative Law Judge
Federal Communications Commission

¹⁶ In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Appendix D

Before the
Federal Communications Commission FCC 86R0-41
Washington, D.C. 20554

In re Applications of)	5636
)	
MID-OHIO)	BC DOCKET NO. 82-282
COMMUNICATIONS, INC.)	File No. BRH-790601F6
)	
For Renewal of License of)	
Station WBBY(FM),)	
Westerville, Ohio)	

Appearances

Lee W. Shubert, Esq. and Richard M. Riehl, Esq. on behalf of Mid-Ohio Communications, Inc.; and Larry A. Miller, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 25, 1986; Released: July 9, 1986.

By the Review Board: MARINO (Chairman), BLUMENTHAL, AND ESBENSEN.

Board Member BLUMENTHAL issuing separate statement, in which Board Chairman MARINO joins, in part.

Board Member ESBENSEN:

1. This proceeding now involves only the application for renewal of license of WBBY(FM), 103.9 mHz, Westerville, Ohio, licensed to Mid-Ohio Communications, Inc. (MOC). By Memorandum Opinion and Order, 56 RR 2d 238 (Rev. Bd. 1984), the Review Board remanded the case for further hearing before Administrative Law Judge John H. Conlin (ALJ) on

new issues¹, including the following with respect to the application of MOC:

To determine whether Mid-Ohio Communications, Inc. (MOC) violated Section 1.65 of the Commission's Rules by failing to report the changed employment status of Richard P. Nourse, or during the hearing misrepresented the facts regarding his employment plans, and the effect thereof on Mid-Ohio's basic or comparative qualifications.

2. Further hearings were held on July 23-26, 1985 on this new issue. In a Supplemental Initial Decision (FCC 85D-75) released December 23, 1985 (SID), the ALJ granted the application of MOC for renewal of license of WBBY(FM). Now, nearly seven years after MOC originally filed its renewal application, the proceeding is before us on Exceptions to the SID filed by the Commission's Mass Media Bureau, Contingent Limited Exceptions filed by MOC, and Reply pleadings filed by both parties. Oral argument was heard on April 11, 1986. We have reviewed the SID in light of all the foregoing and have conducted our own full de novo review of (1) the WBBY(FM) Commission files; (2) the transcript of the proceedings; and (3) the exhibits and documents contained therein. However, before turning to our decision, we are compelled to set forth the history of WBBY(FM) and the related proceedings before the Commission over the past seven years.

3. Background and History: At the outset we specifically note that this extra-record factual recitation does not provide any bases for our decision herein. It may be construed that the facts set forth in this section of our decision could provide additional support for a finding that MOC had a motive to

¹ One other issue was simultaneously specified with respect to the then competing applicant for the frequency, Metro Broadcasting, Inc. (Metro). As will be discussed herein infra, Metro dismissed its application prior to the subsequent hearing proceedings. The issue designated against Metro, perhaps hastening its exit from this proceeding, was as follows:

- To determine whether Metro Broadcasting, Inc., failed to submit complete and accurate information regarding its corporate documents, stock ownership, and financial qualifications in violation of the Commission's filing, reporting and candor requirements, and the effect thereof on Metro's basic or comparative qualifications.

deceive the Commission; however, as will be discussed, infra, there is ample evidence in the record of the original proceeding and the remand hearing pertaining to MOC's motives and intentions. Nevertheless, since this proceeding has occupied some seven years of the Commission's time and resources, a review of the background and history of this beleaguered facility provides an interesting perspective. We have extensively reviewed the Commission's license and ownership report files of WBBY(FM), and officially notice the facts contained therein.

4. The original construction permit for this facility was granted to MOC on June 19, 1968. The current call letters were assigned October 31, 1968, and the initial license for the station was granted May 28, 1969. WBBY(FM) was apparently granted three regular renewals of its license up through and including the period ending in 1979. However, when MOC filed its application for regular renewal on June 1, 1979, Metro Broadcasting, Inc. (Metro) filed a competing application for the frequency. The initial principal of MOC was William R. Bates who owned in excess of 50% of the stock of MOC and was its President and a Director.² Mr. Bates' son, Kenneth M. Bates, was elected an officer and director of MOC in 1968 and was active in the day-to-day operation of WBBY(FM). In 1972, Kenneth also acquired a 10.3% interest in MOC in consideration of his past services.³ On December 8, 1977, Kenneth, as an officer and director of MOC (having failed on at least two occasions prior to this date to have his father committed to an institution) verified a complaint before the Court of Common Pleas of Delaware County, Ohio,

² The stock ownership of MOC now resides entirely with the Carl C. Nourse family. 24% is owned by Carl Nourse's son, Richard P. Nourse (the subject of the issue herein), and 76% by QNP Corporation, a company wholly-owned by Mr. and Mrs. Carl C. Nourse. The acquisition of the stock of MOC by the Nourse family is discussed herein, infra.

³ The remaining stock, approximately 30%, was owned, at various times and in various percentages, by as many as nine other minority shareholders between 1968 and 1977.

seeking to have his father enjoined from continued operation of, and association with, WBBY(FM). The Court granted the injunctive relief sought and filed a final Judgment Entry on February 7, 1978, permanently enjoining William R. Bates from activities associated with MOC.⁴

5. The Nourse family became visible, insofar as the records of the Commission are concerned, in September 1977 — just several weeks before Kenneth Bates went to Court to have his father restrained. Between September 12, 1977 and November 3, 1977, in what were apparently eight separate transactions, Carl C. Nourse, through his wholly-owned company BIC Agency, Inc., bought up 34.7% of MOC's outstanding common stock (including 34% of Kenneth Bates' stock) for a total consideration of \$86,500 in cash and notes. In his Initial Decision, FCC 83D-53, released September 16, 1983 (I.D.), the ALJ noted that Nourse "shared" the "lack of confidence" in William R. Bates and encouraged the lawsuit resulting in Mr. Bates' formal removal from WBBY(FM). I.D., n. 4. Thereafter, on September 18, 1978, Carl Nourse, through the same business entity, bought an additional 10 shares of MOC for \$5,000 from Sam Bates (presumably, though not disclosed, a Bates family member or relative), increasing the Nourse holdings to 36.7%. Just 46 days later, on November 3, 1978, Nourse concluded acquisition of all remaining "minority shares" of MOC by purchasing the balance of the stock held by Kenneth Bates (33 shares) and all the stock held by the other member of the MOC Board of Directors (David C. Mylander) for a total consideration of \$50,400 on "installment contacts". On November 9, 1978, QNP Corporation, also wholly-owned by the Nourse family, purchased the shares held by BIC Agency, Inc. Thus, within 14 months, Nourse-owned entities (1) acquired a 49.9% interest in MOC for \$141,900 in cash and notes; (2) encouraged the lawsuit to have William R. Bates removed from WBBY(FM); and (3) purchased all the shares held by Mr. Bates' son and the other remaining director of MOC.

⁴ The Court opined, *inter alia*, that the elder Mr. Bates had performed actions which demonstrated lack of business knowledge; allowed his (FCC operator's) license to lapse; performed his "unauthorized" "Wild Bill Routine" in public at remote broadcasts; and was suffering from a "medical condition" which impaired his ability to function on behalf of MOC.

6. It is also notable that on September 25, 1978, MOC entered into an agreement with yet another Nourse family entity, Capital Car Rentals Company, Inc. (Capital Car), agreeing to issue 15 of the remaining 19 authorized but unissued shares of MOC to Capital Car in exchange for a new transmitter for WBBY(FM). On the same date, Capital Car entered into an agreement to assign all these shares to Carl Nourse's BIC Agency, Inc. On December 18, 1978, in an attempt to gain control of MOC, an application for transfer of control was filed with the Commission (I.D., para. 3) based upon the issuance of these 15 shares, absent the signature of William R. Bates, the controlling shareholder. No action was taken on the application and, apparently as the result of informal contact with the Commission's staff, on February 23, 1979, the application for transfer of control was resubmitted with a letter from then-counsel to MOC claiming that Mr. Bates' signature was not necessary and that the consummation of the transaction to issue these 15 shares would result in a transfer of control. Again, no action was taken by the Commission.

7. In the meantime, William R. Bates' problems were exacerbated by the entry of a Decree of Divorce from his wife of 25 years, Anna, effective September 28, 1978. In this Decree, inter alia, the Court ordered Mr. Bates to sell his stock, real property, tower, and related assets in MOC, and divide the proceeds therefrom with his wife. Mr. Bates was unsuccessful in an appeal; thus, he entered into a listing agreement with a broadcast property broker, Chapman Company, Inc., of Atlanta, Georgia, whereby Chapman would conduct a sale of Mr. Bates' assets on a highest sealed-bid basis. The sale was advertised on August 12, 1979 and sealed bids were to be received just 24 days later. On September 7, 1979, the sealed bids were opened and the Nourse family, through QNP Corporation, was the highest bidder. The assets, which included the controlling interest in WBBY(FM), sold for \$172,500, with 25% down and the balance due over three years. Thus, in September 1979, the scoreboard read as follows: The Bates family no longer had any ownership interest in WBBY(FM) and William R. Bates, the former president and majority shareholder, had realized \$86, 250; his wife, Anna, \$91,250;

and Kenneth, the son, \$34,900. Conversely, the Nourse family had obtained 100% of MOC for \$314,400, consisting of part cash and favorable terms on the balance.

8. The activities at WBBY(FM) attracted the attention of other media in the area. The record is replete with references to the "bad publicity" surrounding the activities at the station. Since most of these events occurred around the time the regular application for renewal of license of WBBY(FM) was to be filed, it is not surprising that a competing applicant, Metro, filed an application for the WBBY(FM) facilities on September 4, 1979.⁵

9. Approximately three years later the Commission promulgated a Memorandum Opinion and Order, 90 FCC 2d 114 (1982), designating the applications of MOC and Metro for comparative hearing to determine the best qualified applicant to operate WBBY(FM). In the same Order, the Commission also granted the pending transfer of control application to the Nourse's QNP Corporation noting that "at this point in time there is no one with an unencumbered legal right to vote [William R. Bates'] 50.1% stock interest" and that the grant would "best serve the public interest by ensuring continued operation of the station during the pendency of the

⁵ Mr. Bates also filed a competing application to get his station back but his application was dismissed for failure to prosecute some two years later (on December 3, 1981).

hearing proceeding." 90 FCC 2d at 117-188.⁶ The Order also specified the standard comparative issue, as well as a financial qualifications issue with respect to Metro.⁷

10. In granting Metro's application and denying MOC's application for renewal of license, the ALJ found that the Nourse-owned entity should not receive credit for the broadcast record of WBBY(FM), nor should it be tainted by any deficiencies attributable to its operation because for most of the license term in question "legal control of (MOC) was in limbo." I.D., Findings, para. 23. Nevertheless, the ALJ did conclude, based upon examination of the past performance of WBBY(FM), that its past record warranted "neither a preference nor a demerit." I.D., Conclusions, para. 17. The ALJ ultimately concluded that no preference had been found for diversification of media ownership interests, and that "Metro has been found superior in terms of integration of ownership with management."⁸

⁶ It is interesting to note that in this Order the Commission considered allegations made by Metro in a Petition to Deny concerning, inter alia, alleged misrepresentations of Carl C. Nourse. The Nourse family was apparently attempting to purchase AM station WRFD, Columbus-Worthington, Ohio. Metro alleged that Nourse represented to a principal of the licensee of WRFD that he (Nourse) exercised positive control over the licensee of WBBY(FM); Metro further alleged that Nourse's corporation, QNP, had prematurely assumed control of WRFD by having the licensee hire a general manager. The allegations were denied, and the Commission declined to add the requested issues. With the clarity of hindsight and our extensive review of the entire record herein, including the actions and activities of the Nourses and the testimony of Carl C. Nourse, it may be that there was, after all, more fire than smoke in Metro's allegations.

⁷ Metro satisfactorily resolved the financial issue in its favor on the first day of hearing.

⁸ Interestingly enough, the ALJ also concluded that Richard Nourse's proposed integration constituted impermissible upgrading because it related directly to the comparative issue and Richard became a stockholder more than a year after the cut-off date. I.D., Conclusions, paras. 14-15. Had MOC perspicaciously recognized this probable outcome, it would not find itself in its current predicament.

11. Shortly after release of the I.D. granting Metro's application, both parties filed Motions to Enlarge the issues and reopen the record. We added both requested issues. Metro, then facing a potentially disqualifying issue, elected to dismiss its application in return for the payment of \$103,000 by MOC. Memorandum Opinion and Order, FCC 85M-2518, released June 26, 1985.⁹ Thus, having eliminated the Bateses from ownership of WBBY(FM)¹⁰ and the competing and prevailing applicant (Metro) from the scene, the Nourse family proceeded to the remand hearing with only one (albeit significant) issue remaining to be resolved. Again, we have not relied upon the foregoing in reaching our decision herein; however, even if the perspective gained by a review of these facts is not more than of passing interest, it also reflects our concern with reviewing all information that may have, or had, a bearing on this proceeding.

12. Discussion: Pursuant to the remand issue, and the evidence adduced thereunder, our discussion herein will focus on the following pertinent considerations: (1) Did MOC violate Section 1.65 of the Commission's Rules by its alleged failure to report that Richard Nourse was, in fact, working in another capacity for another business entity (Pioneer Chevrolet) during

⁹ The ALJ noted in this Order that a previous settlement agreement filed by the parties in December 1984 was contingent upon MOC favorably resolving the issue under review herein. MOC filed a Motion for Summary Decision which was denied by the ALJ in April 1985. The parties reformulated the terms of the settlement agreement to provide for payment by MOC to Metro regardless of the pending issue, and the settlement agreement was approved.

¹⁰ Kenneth Bates "resigned" as General Manager in 1982. LD., Findings, para. 18. More succinctly, the ALJ found (SID, para. 60) that "[w]hen the Commission granted the transfer of control of [MOC] to QNP, the Nourse family felt compelled to replace the then general manager, Ken Bates. Ken was the son of Bill Bates, from whom control of [MOC] had been wrested as the result of a legal battle between the elder Bates and QNP." It is noteworthy that Kenneth Bates joined with his father, William R. Bates, in executing an agreement on October 2, 1982 to assign the license of WBBY(FM) to a third party assignee, Westerville Broadcasting Company, Inc., for a total consideration of \$800,000.00 The application was filed with the Commission on November 24, 1982. MOC naturally filed a Motion to Dismiss, claiming the Bateses no longer were officers, directors or shareholders of MOC. The prospective assignee (Westerville) dismissed its application on September 5, 1985.

the time he was purportedly working full-time for MOC and WBBY(FM)? (2) Did Richard Nourse, even though he was allegedly employed elsewhere, actually devote the claimed amount of time (40 hours per week) to MOC and WBBY(FM)? (3) Did Richard Nourse, in considering the facts pertaining to item (2), actually perform full-time duties for MOC and WBBY(FM) as the Station Manager of WBBY(FM)? (4) Did MOC falsely represent facts to the Commission concerning Richard Nourse's employment status in order to obtain a comparative advantage in the initial hearing proceeding?

13. Following four days of testimony in the remand hearing proceedings in July 1985, the ALJ reluctantly granted the application of MOC, concluding in pertinent part (SID, para. 76), emphasis added) as follows:

If this were still a comparative proceeding the record developed in this phase of the case would be sufficient to warrant a substantial comparative demerit. Bay Television, Inc., 85 FCC 2d 181, 185 (Rev. Bd. 1983). Even in a non-comparative context, there is some question whether renewal of WBBY's license should be granted. On balance, however, the presiding officer has concluded that denial of the application would be an action more severe than is warranted. Despite its several facets, the conduct in question amounted to what was in fact a single transgression: failure to disclose a material fact involving one aspect of its integration proposal. It was, moreover, mitigated by the fact that Richard Nourse continued to work at the station and for most of the relevant time period was in reasonable compliance with the commitment made in Mid-Ohio's direct case exhibit regarding ownership integration. Thus, notwithstanding Mid-Ohio's failure to meet Commission standards regarding openness and fair dealing in the prosecution of its application, it is concluded that denial of the application for renewal of license is a more drastic action than the licensee's conduct warrants. Since there is no provision for consideration of a forfeiture, the censure expressed in the proceeding paragraphs must suffice.

14. In the Exceptions and Reply pleadings now before us, the Commission's Mass Media Bureau argues vehemently for disqualification. MOC, with equal fervor, argues that any detrimental findings against it be set aside. MOC also argues that the entire record must be examined prior to the issuance of our Decision (correctly citing Section 556(d) of the Administrative Procedure Act (5 U.S.C. 556(d)). As noted, supra, we have exhaustively conducted our own review and conclude that the reluctant decision of the ALJ to renew the license of WBBY(FM) should be modified as indicated herein, pursuant to prevailing Commission policies.

15. In a letter dated May 28, 1982¹¹ to MOC principal Carl Nourse the then-counsel for MOC suggested that Richard Nourse be "installed" as "Station Manager" to bolster MOC's comparative posture. This suggestion was putatively accepted by MOC, and MOC thereafter relied upon the integration proposal of Richard Nourse in this alleged managerial position.

¹² Thus, it is important to initially examine just what Richard Nourse actually did (or did not do) for WBBY(FM) in this capacity. As the ALJ perspicuously noted, the record in the proceeding is virtually devoid of documentary evidence with respect to the remand issue, and relevant evidence was adduced

¹¹ Mass Media Bur. Exh. 8, p.2.

¹² At the commencement of the initial hearing on November 16, 1982, MOC submitted direct written testimony of Richard Nourse (MOC Exh. 2, pp. 9-10) which claimed, in pertinent part, as follows:

As Station Manger for the station, Mr. Nourse assists the General Manager in overseeing the day-to-day operations of WBBY(FM). His responsibilities include assisting in the management of the station's business affairs, conducting personnel interviews, doing market research, overseeing EEO compliance, maintaining the station's payola file and assisting in the sales area. He is also in charge of public relations and station maintenance.

Richard P. Nourse devotes 40 hours or more per week to his work for Mid-Ohio and WBBY(FM) and to QNP's investment in Mid-Ohio. He proposes to continue this time commitment to the station.

almost solely upon the testimony of various witnesses.¹³ With respect to the actual duties and functions performed by Richard Nourse at WBBY(FM), the ALJ found that "The testimony is frequently less than specific, particularly regarding the time frame and the amount of time that [Richard Nourse] actually devoted to the tasks being described." (SID, para. 32). Thus, a summary of the more salient findings concerning Richard Nourse's activities is important.

16. On June 10, 1982 (a few days after the original hearing designation order was released), Bryan McIntyre was hired by Carl Nourse as a "consultant" for MOC. Initially, McIntyre worked as a liaison between Carl Nourse and then counsel to MOC, as well as between Carl Nourse and the WBBY(FM) staff. McIntyre compiled material for the initial hearing and assisted in the preparation of some documents by providing information to the attorneys. He also reviewed documents which had been prepared by then-counsel for MOC for completeness and accuracy. McIntyre also began training Richard Nourse to be "Station Manager" at WBBY(FM), a position in which Richard would allegedly be working with the station's Public File, its EEO plan, its sales operations and with its programming. At the time, the person at WBBY(FM) with the title of "General Manager" was David R. Freeman, a former sales manager at WBBY(FM). (SID, paras. 33-34).

¹³ These witnesses included Carl Nourse, Richard Nourse, Brian McIntyre (former "consultant" to MOC) and David Freeman (former "general manager" of WBBY). However, it is noteworthy that Richard Nourse was advised (apparently by counsel) to keep a "diary" of his activities relating to his activities at WBBY(FM). This potentially valuable documentary evidence was not available. The transcript reveals the following (Tr. 1468):

[MOC COUNSEL]: . . . Were you requested to keep some form of writing commemorating the amount of work that you did for the station?

[RICHARD NOURSE]: Yes.

[MOC COUNSEL]: When, approximately, and in what time frame was the document kept and what was the document?

[RICHARD NOURSE]: It's in the form of a diary which I, to this day, have no good explanation of why I screwed it up. But that's all I can say that I did. I was making - - - I don't know what I did to make that error.

17. McIntyre and Richard apparently occasionally met and discussed station affairs. Sometimes the two would go to the business offices in Westerville or the studios in Sunbury to review various projects. Much of Richard Nourse's initial association with McIntyre consisted only of the latter explaining to Richard what McIntyre was doing at the station. Richard, in June 1982, allegedly worked on establishing certain personnel procedures and policies. In addition, it was claimed that he was "involved" with planning for the upgrading of WBBY's equipment and facilities. He purportedly worked on compensation programs for sales personnel to make the programs more conducive to keeping sales personnel at the station. However, he did not make any sales calls. (SID, paras. 35-36).

18. Richard purportedly "worked" with McIntyre on the preparation of an employee manual which attempted to codify such things as paid insurance, vacation and sick leave policy, and the like. Another alleged duty was the "supervision" and "maintenance" of the station's Equal Opportunity Employment Compliance File and the Payola File. Neither of the tasks took much time, because both could be accomplished by simply organizing the station's files. Thereafter, the files were essentially self-sustaining. Richard also claimed to assist in the development of a computer program which interfaced with the operation of the radio station and monitored, on a daily basis, the status and progress of all the family businesses - the radio station, the auto dealerships and the tennis club. He was also said to have attempted the development of a computer program which would program WBBY(FM) music, based upon a card catalogue system which was in-place; however, the program not be implemented due to hardware limitations which made the software program impractical. (SID, paras. 37-38).

19. After the Nourse family entity assumed control of WBBY(FM), management meetings were held on a weekly basis. Richard Nourse attended "most" of the meetings held during the summer of 1982. After beginning as a "station manager" trainee, Richard Nourse assumed the title and position of "Station Manager" about August 1982. Press releases were apparently issued naming him to the position. (SID, paras. 39-40).

20. During a one-month period (September 1982), Richard Nourse claims to have spent "five to seven hours" each week working on maintenance at the station. The station's physical plant was in poor condition. The studio was located in Sunbury, Ohio in a corn field; a long gravel driveway leading to the building was strewn with pot holes; brush had grown up around the building, and the area was littered with trash. With Richard Nourse's participation and "supervision," the trash was removed and the studio renovated. (SID, para. 42).

21. In September 1982, Richard "worked" with the station's program director on concepts for revamping the programming at WBBY(FM). During September and October 1982, he purportedly surveyed people concerning their jazz music attitudes, and allegedly sought to develop a repertoire which might be the foundation for the station's programming. The identification of different, mass-appeal music, led to the cataloging of music at the station. There were 20,000 albums, with eight to ten cuts each, to be catalogued. The process apparently ran for nine or ten months through the fall of 1982 and the spring of 1983. Other Nourse family members and Richard apparently typed the catalogue cards. (SID, paras. 43-44).

22. Richard Nourse was also apparently involved in the hiring of two announcers. Richard Nourse, Bryan McIntyre and Carl Nourse met with one of the announcers several times before he was actually hired. Richard Nourse purportedly prepared the employment agreement for the announcer who was hired as the morning personality. (SID, para. 46).

23. Near the beginning of 1983, Richard Nourse worked with McIntyre on plans to utilize newly-found office space for a receptionist's area, studio space, a conference room, a music library, and the like, and also worked on finding alternate space for the sales offices and studios. Richard also worked with McIntyre in connection with some engineering matters at the station. These pertained to the selection and ordering of new equipment for the new studios when the studios were moved from Sunbury. However, this was no more than essentially a learning experience for Richard, involving such things as determining which equipment was superior and which was affordable. (SID, paras. 49-52).

24. However the Mass Media Bureau argues that Richard's written testimony (set forth at note 12, supra) was false and misleading at the time that it was made. The Bureau claims, for example, that Richard's statement that, as Station Manager, he assisted the General Manager in overseeing the day-to-day operations of WBBY(FM) was false. McIntyre's testimony indicates that he did not feel "comfortable" with the reference to Richard Nourse as full-time Station Manager (Tr. 829), and that naming Richard as such was merely an exercise of just putting a title on a person (although McIntyre did indicate that he believed that Richard's activities were of a managerial nature) (Tr. 830). The Bureau observes that Richard never had an office (or even a desk) at any of WBBY(FM)'s facilities and was never on the station's payroll. With respect to Richard's original hearing statement that he was "assisting the station's General Manager" (purportedly David Freeman), the Bureau asserts that Richard's testimony at the remand hearing that he "meant" Carl Nourse when referring to the General Manager does not square with Carl Nourse's initial hearing testimony. Specifically, when Carl Nourse originally testified, Carl obviously meant David Freeman when he referred to meeting with the "General Manager" (Tr. 1133-36).

25. The Bureau also disputes the finding that Richard Nourse prepared the station's "employee manual," claiming that, although Richard Nourse contributed some information from other family businesses, McIntyre and Hodges were, in fact, those persons more actively involved in the preparation of the employee policies (Tr. 781-2, 959). Indeed Carl Nourse had testified in November 1982 that he was responsible for creating the employee manual and setting station policies. (Tr. 219). In point of fact, Carl Nourse changed his testimony at the remand hearing to attribute these actions to Richard Nourse. (Tr. 1216-7).

26. With respect to the format change attributed to Richard Nourse, the bureau argues that the change was in reality just as much Carl Nourse's idea as anyone else's (Tr. 165-6, 767-9). Moreover, it was McIntyre and the station's program director who were responsible for implementing the changes, not Richard Nourse. Thus, at the hearing in November 1982, Carl Nourse

testified that the format change was his idea (Tr. 165-6, 1224). The Bureau holds that Carl Nourse originally claimed the credit for the format change in order to bolster his own integration proposal; however, at the remand hearing Carl Nourse attributed the credit for the format change to Richard Nourse in an obvious attempt to bolster his son's claim of participation in station affairs.

27. The Bureau further contends that the types of projects that Richard Nourse was involved in were, for the most part, general interest matters that would be proprietary interests similar to those for any part-owner of a radio station. His asserted concern with the profits and losses of the station was similarly expressed for the family's tennis club and numerous car dealerships. With respect to the computer system, Richard Nourse spent a good deal of time looking for a system to be used predominantly by other family businesses and in negotiating for property to be purchased by the family corporation. QNP. (Tr. 1160-1166, 1175, 1407). Richard Nourse's claimed market research actually involved no more than asking people he encountered at Windsong Tennis Club (another Nourse family-owned business where Richard was employed full-time as general manager from 1978 until, he alleges, August 31, 1982. MOC Answers to Interrogatories, p.8) about their concepts of jazz music (Tr. 1343). Richard Nourse's purported oversight of the station's EEO compliance and maintenance of the station's "payola" file involved only a few hours per month, at best. (Tr. 842, 1416-1418). Similarly, any input by Richard Nourse in the sales area was quite limited (Tr. 1141, 1245). Moreover, Richard Nourse was not in charge of public relations, although he may have had some limited public relations-type meetings. Also, he was not in charge of station maintenance, although he helped with the cleanup project at the station studio (Tr. 908, 1196).

28. Finally, with respect to the alleged activities of Richard Nourse as "Station Manager" of WBBY(FM), the ALJ made the following findings concerning the testimony of the former Sales Manager and General Manager of the station, David Freeman (SID, para. 58):

Freeman's testimony can be summarized as follows: he stated that to his knowledge Richard was not involved

in personnel decisions (Tr. 623) and had no knowledge that Richard ever interviewed any sales applicants. He did recall that Richard once suggested that a larger sales staff be hired. Tr. 624, 651. During the period that Freeman was at WBBY, he saw Richard at the station fewer than half a dozen times. Tr. 625. Freeman never saw Richard at the Sunbury studios but did see him several times at Quality Chevrolet. Tr. 626. Freeman only recalled seeing Richard at two management meetings after June 1982. Tr. 628. Freeman was not aware of any market research that Richard had done (Tr. 641) and considered Bryan McIntyre to be generally responsible for the EEO file and Payola file. Tr. 642-3. To Freeman's knowledge Richard was not responsible for station maintenance although he was told by Carl that "the boys" cleaned up the Sunbury studio. Tr. 647-8. The concept of different music by different day parts evolved over a period of time with Hodges and McIntyre having the most input. Tr. 657-8. Although Richard did suggest some songs and albums, his suggestions were not implemented. Tr. 660. The station's logo was changed to "The Entertainment Alternative" based on suggestions made by Richard, although he did not suggest that particular logo. Tr. 666-8. To Freeman's knowledge Richard was not involved in the selection of equipment. Tr. 661-3.

We note, however, that the ALJ found that the testimony of Brian McIntyre was "more reliable" with respect to Richard's activities than Freeman's, since McIntyre (the ALJ opined) was more knowledgeable about Richard Nourse's activities. Nevertheless, the ALJ specifically declared that he did not doubt Freeman's essential veracity (SID, para. 59).

29. Having examined what Richard Nourse might or might not have done on behalf of WBBY(FM) as "Station Manager", we now turn to the matters at the heart of this proceeding: the alleged Section 1.65 violations and related misrepresentations. Initially, in order to persuade us to add issues against MOC, the then-competing applicant, Metro, filed a Motion to Reopen the Record and to Enlarge the Issues on November 2, 1982, alleging that Richard Nourse was not, in

fact, working at (or on behalf of) WBBY(FM).¹⁴ Metro contended, in essence, as does the Bureau in its exceptions, that MOC made a conscious and disingenuous effort to conceal Richard Nourse' true employment situation from the Commission by submitting false and misleading information as follows: (1) On September 1, 1982, MOC filed answers to interrogatories stating that Richard Nourse no longer worked at Pioneer Chevrolet, Marietta, Ohio; (2) On October 20, 1982, MOC prepared its Exhibit 2 stating that Richard Nourse had worked at Pioneer Chevrolet in the summer of 1982 as Acting General Manager but did not state that Richard Nourse was again working the same amount of time at Pioneer Chevrolet with added responsibilities; (3) On October 25, 1982, MOC supplemented its answers to interrogatories by stating that Richard Nourse's time devoted to WBBY(FM) has "varied" but failed to state that Richard Nourse was indeed working

¹⁴ In support thereof, Metro alleged (Motion at 6-7), inter alia, the following:

- In June 1983, Richard P. Nourse was arrested for failure to possess a valid motorcycle operator's license. He identified his home address as Marietta and his employer as "Pioneer Chevy, Marietta, Ohio" . . . He was again arrested for a traffic infraction in August 1983 in the vicinity of Marietta for driving in excess of posted speeds. Although he did not list his employer, he did list his position as one of "sales", inconsistent with the position of "station manager" he allegedly occupies at WBBY.

Metro retained the services of Joseph E. Driscoll, a licensed private investigator, to ascertain the employment status of Mr. Nourse. On October 13, 1983, Mr. Driscoll called Quality Chevrolet, Inc., Columbus, Ohio, an automobile dealership owned substantially by Carl R. Nourse . . . He spoke to Donna Sickel and later to Roger Freeman. He asked both persons for Richard Nourse, but was informed that he was in Marietta working at an auto dealership. Ms. Sickel identified the dealership as "Pioneer", and Mr. Freeman identified it [as] Pioneer Cadillac-Chevrolet. Mr. Freeman and Ms. Sickel both acknowledged that Mr. Nourse usually could be reached there during the week, and Mr. Freeman stated that Mr. Nourse "runs the store" at Pioneer . . . Mr. Driscoll then visited the showroom of Pioneer Chevrolet-Cadillac located on Newport Pike, Marietta, Ohio, on October 17, 1983. He spoke to one Evelyn Decker, who informed him that Mr. Nourse was in Charleston, West Virginia, that day for a Chevrolet sales meeting. She stated that he was usually present on the Pioneer premises Monday through Saturday, and she gave Mr. Driscoll several business cards, one of which is attached to his Statement. She stated that Richard Nourse's position at Pioneer was that of "manager".

as General Manager of Pioneer Chevrolet; (4) On November 16, 1982, Richard Nourse testified at the hearing that his written testimony (MOC Exh. 2) was true and correct without mentioning his work at Pioneer Chevrolet; (5) On January 25, 1983, in its reply findings, MOC stated that Richard Nourse was fulfilling his commitment to the station at the present time even though Richard Nourse was by then spending time each week at Pioneer Chevrolet; (6) On October 17, 1983, Mid-Ohio stated in exceptions that Richard Nourse was working more than 40 hours per week as station manager assisting the General Manager in all areas of station operation when in fact he was spending less time than before on station affairs and was working each week at Pioneer Chevrolet.

30. With its November 16, 1983 Opposition to Metro's Motion to Enlarge Issues, MOC submitted a declaration of Richard P. Nourse. This declaration is also important in that it forms one of the principal bases for MOC's defense at the remand hearing. In pertinent part, Mr. Nourse's statement (Attachment A at 1-3) claims the following:

My family received Commission consent to take control of WBBY(FM) in June 1982. The actual transfer of control occurred in August 1982. During the summer of 1982, I worked on a part-time basis at Pioneer Chevrolet-Cadillac, Inc. in Marietta, Ohio. Pioneer Chevrolet is an automobile dealership and is owned by my father, Carl C. Nourse, and Paul Aselin. Paul Aselin worked as General Manager and Dealer of the dealership. In the summer of 1982, Mr. Aselin took a leave of absence because his personal and business affairs required that he be in Columbus, Ohio much of the time. At the request of my father and Mr. Aselin, I worked at the dealership and oversaw its operation on their behalf during that summer.

In September 1982, Mid-Ohio filed answers to Metro's interrogatories which disclosed that I had worked at Pioneer Chevrolet during the summer of 1982. As of September 1, 1982, I was no longer working at Pioneer Chevrolet and Mid-Ohio's answers reflected that fact.

After Mid-Ohio's initial answers were filed, Mr. Aselin again asked me to help out at Pioneer Chevrolet. In September 1982, I began to fill in for Mr. Aselin at the dealership. Because the time I spent at Pioneer initially took more time than expected, Mid-Ohio filed supplemental answers to Metro's interrogatories in October 1982 disclosing the fact that my time commitment to WBBY(FM)'s affairs had varied since the original answers had been filed. In the supplemental answers filed October 25, 1982, it was correctly stated that, at that time, I was devoting 40 hours or more per week to station affairs and intended to devote that amount of time after Mid-Ohio's application was granted. Metro easily could have explored this matter and received forthright answers by simply asking me at hearing, rather than resorting to private investigators after ignoring me at hearing.

From October 1982, through December 1982, I continued to devote more than 40 hours a week to station affairs. During this period, I also spent approximately two days per week helping Mr. Aselin at Pioneer Chevrolet.

In mid-January 1983, Mr. Aselin's personal and family problems became more serious. He told me that he had to spend more time in Columbus and that he could not run the dealership without more help. At Mr. Aselin's request, and in light of the personal crisis that he faced, I agreed to spend an additional day per week at the dealership. Between January 1983 and September 1983 I filled in for Mr. Aselin at Pioneer Chevrolet approximately three days per week. I felt that I was helping Mr. Aselin only on a temporary basis, pending the grant of WBBY's renewal. During this period I continued to work between 30 and 40 hours per week on matters related to the operation of WBBY(FM).

In September 1983, Judge Conlin denied Mid-Ohio's renewal. Since that time to the present, I have continued to devote approximately 30 hours per week on station affairs. However, because my commitment to work at the

station was contingent on the grant of our application, I believed I would spend more time working at Pioneer Chevrolet. Subsequent to the denial of the renewal, I became General Manager at the dealership where I spend 36 hours a week.¹⁵

31. Shortly before the filing of Metro' Motion to Enlarge Issues, Exceptions to the Initial decision were filed by the parties with the Review Board. Pursuant thereto, Oral Argument on these Exceptions was heard on January 12, 1984. During this proceeding the Review Board evidenced its concern with the proposed integration representations of Richard Nourse.

[BOARD MEMBER JACOBS]: Before you sit down, and speaking of Richard Nourse, is it your contention that he spends 40 hours a week at Pioneer Chevrolet and 30 hours per week in Westerville, and makes a 200 mile round trip commute.

[COUNSEL FOR MOC]: We have laid out his hours, and his schedule and his commuting time in the affidavit submitted to you in opposition to the motion to reopen. As I understand it, it would be improper for me to discuss that motion at this time. It was not designated or oral argument, but I can say that his commitment has not lapsed, his commitment has not lessened and it has been renewed in the very pleadings before you.

[BOARD MEMBER]: Unfortunately, everything that is filed here is subject to the oral argument. It's not merely the exception. I meant apart from our studying the affidavit.

¹⁵ In its Exceptions (at 3), the Bureau also claims that this statement compounds the misrepresentations of MOC:

[On] November 14, 1983, in an affidavit in response to the petition to enlarge issues, Richard Nourse stated that he continued to work 30-40 hours per week on station affairs even though [he] had married and a new General Manager at WBBY had been hired. Within two weeks he had moved to Marietta with his wife and no longer commuted to the station. [Moreover, the] fact that Richard Nourse moved to Marietta and by his own admission was no longer involved in the day-to-day operation of WBBY, was not reported to the Commission until January 1985. Richard Nourse's move and termination of his involvement at WBBY was reported only after the issue was raised by Bureau counsel at Richard Nourse's deposition.

[COUNSEL FOR MOC]: He is presently serving 30 hours in connection with station business, discharging his obligation. He fully intends to bring that up to 40 hours as he was doing at the time of hearing as soon as Judge Conlin's decision is reversed and the Nourse family can be put fully into control of the station.

[BOARD MEMBER]: Well, how does he manage to succeed in doing 30 hours 100 miles away?

[COUNSEL FOR MOC]: I do not have independent--

[BOARD MEMBER]: What does the affidavit say?

[COUNSEL FOR MOC]: The affidavits indicate that he works an abbreviated schedule at the car dealership and commutes back up to the Columbus metro area in order to do business in connection with the station. I also understand, although this is not in the record, that he takes care of certain station affairs outside of Columbus interviewing prospective employees.

[BOARD MEMBER]: You mean he travels to Westerville, spends 30 hours there and then comes back or does he come back the same night that he travels?

[COUNSEL FOR MOC]: I don't know the answer to that.

[BOARD MEMBER]: But, what troubles us is, I think, the impression given at the hearing that Richard was going to continue right up until the time of grant with that 40 hour commitment. Not for him to be saying, well, at the time of hearing, I'm working 40 hours, and then who knows what'll happen, but at the time of grant, I'll again be working 40 hours.

* * *

[BOARD MEMBER]: Well, the hearing was in November of 1982, wasn't it?

[COUNSEL FOR MOC]: Are you speaking to me, sir?

[BOARD MEMBER]: Yes.

[COUNSEL FOR MOC]: Yes, it was.

[BOARD MEMBER]: And, in October 1982, he already was working part time at Pioneer two days a week.

[COUNSEL FOR MOC]: We had indicated in an amended answer to interrogatories that his hours had varied from that which was expected and we did so as soon as we were informed of it to put all parties on notice. But, what, in fact, happened, is that Metro simply waived its cross [examination], did not explore the issue at all and got no answers.

[BOARD MEMBER]: I understand. But the hearing occurred in November 1982 and it's your own client's testimony that from October to December 1982 he was working two days a week at Pioneer and it's your contention in response to the motion to reopen, that beginning in January 1983 he began working how many hours? That was January, wasn't it?

[COUNSEL FOR MOC]: He did work at Pioneer in January.

[BOARD MEMBER]: Well, what's wrong with what the chairman just said? That no sooner was the hearing over that he increased his amount of time at Pioneer?

[COUNSEL FOR MOC]: Well, I believe that the affidavit sets out the emergency loads, independent of any Richard had control over, which was a personal and family crisis in the then existing manager at Pioneer.

[BOARD MEMBER]: No, except they didn't tell anyone about it.

[COUNSEL FOR MOC]: He considered it a temporary measure to try to pull Pioneer through.

[BOARD MEMBER]: It lasted for nine months and then he became very disappointed when he lost the initial decision and switched to full time.

[COUNSEL FOR MOC]: That's what it is. The affidavits must speak for themselves since I have no independent facts to give you.

[BOARD MEMBER]: Well, all I'm saying is that beginning in October, at least October 1982 to the present, it appears that Richard has been spending an increasing amount of time at Pioneer Chevrolet and never indicated that he was going to be increasing it, presumably because he thought it wasn't important.

[COUNSEL FOR MOC]: He and his father both considered it not decisionally significant. (Tr. 479-484, emphasis added.)

32. Shortly after this colloquy and the routine exchange of pleadings, we added the issue noted supra at paragraph 1. The ALJ concluded that Richard Nourse's changed employment status (working at Pioneer Chevrolet) "was a matter of decisional significance since it was material to the ownership integration" credit claimed by MOC in the initial hearing; thus, the failure to report same was a clear violation of Section 1.65 of the Commission's Rules (SID, para. 69). However, with respect to the misrepresentation aspect of the designated issue, the ALJ decided "[o]n balance . . . there is substantial evidence to support the conclusion that Richard Nourse's participation in station affairs was sufficiently extensive to permit a good faith claim that during the course of the hearing he was devoting about 40 hours per week to station affairs." (SID, para. 71; footnote omitted). The ALJ also concluded that the failure to report the changed employment circumstances of Richard Nourse was only a "single transgression: failure to disclose a material fact involving one aspect of its [MOC's] integration proposal" (SID, para. 76).

33. The exceptions of the Bureau have been noted hereinabove. However, MOC, inter alia, while concurring with the ultimate conclusion to grant the renewal application of WBBY(FM), excepts to the findings and conclusions that MOC violated Section 1.65 of the Commission's Rules. MOC claims that these findings and conclusions were based upon speculation and surmise; that the ALJ failed to consider all material facts and applied a "different standard" to MOC; and that the ALJ failed to follow existing precedent. MOC further finds fault with the exceptions filed by the Bureau, claiming that the Bureau's argument that there was more than a "single transgression" (that is, multiple misrepresentations of Richard Nourse's changed employment status) is merely based upon evidentiary fragments, viewed in isolation and "out of context." Having examined at length the entire record herein and considered all the decisionally significant exceptions filed by the parties, we reach the following conclusions.

34. Conclusions: We concur with the ALJ that it is patently clear that MOC substantially violated Section 1.65 of the Commission's Rules. MOC, in the initial hearing proceeding, argued repeatedly that its existing and ongoing integration of ownership with management was a highly significant factor in favoring grant of its renewal application. (SID, para. 65). MOC stridently stressed that its integration, unlike that of its then-competing license challenger, Metro, was not merely a proposal but "it is living, breathing integration realized" (MOC Exceptions to Initial Decision, p. 17; emphasis added), since Mrs. Nourse and Richard "have been devoting more than forty hours per week to station affairs" (Id.). Nevertheless, as the ALJ concluded, it is undisputed that MOC did not disclose the fact (until November 1983) that Richard Nourse had taken the position as General Manager of Pioneer Chevrolet in Marietta, Ohio, some 120 miles distant from Westerville, in September 1982. Even then, the disclosure of Nourse's employment status was forthcoming only in response to a Petition to enlarge Issues filed by Metro, after the record in the initial proceeding had been closed. (SID, para. 65).

35. Clearly, Section 1.65 (47 CFR § 1.65) of the Commission's Rules requires applicants for Commission authorizations to report substantial changes in matters of decisional significance.¹⁶ The function of Section 1.65 is to ensure that the information reported in applications remains substantially accurate and complete in all significant respects and to ensure that fair administrative practice is observed in comparative hearing proceedings. The rule is intended to apply (1) "where there has been a substantial change and (2) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest." Reporting of Changed Circumstances, 3 RR 2d 1622, 1624 (1964). More specifically, applicants are obliged to report "any substantial change in circumstances pertaining to . . . factors urged as a basis for a grant or a comparative preference." Id. Excluding from the scope of the rule "minor changes which would have no significance" and even "some material matters [which] normally fluctuate on a day-to-day basis," the Commission has characterized the intent of Section 1.65 as requiring disclosure of changed circumstances "which may make a difference from the standpoint of the public interest, and those which the Commission should be aware of in order to reach a realistic decision." 3 RR 2d at 1625 (emphasis added). See Allied Broadcasting Co. v. FCC, 435 F.2d 68 (D.C. Cir. 1970).

¹⁶ Section 1.65 of the Commission's Rules provides the following:

Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with §1.47.

36. Herein, Richard Nourse's changed circumstances (General Manager of Pioneer Chevrolet) was a critical factor in assessing his and MOC's integration proposal. MOC claims that since Richard purportedly continued to devote "40 hours per week" to WBBY(FM), his active stewardship of Pioneer was not a substantial change of material significance. In rejecting MOC's defense out of hand, the ALJ properly concluded:

"In the first place, (Section 1.65) specifically provides that applicants are 'responsible for the continuing accuracy and completeness of information furnished . . . in Commission proceedings involving a pending application.' In answers to interrogatories filed on September 1, 1982 Mid-Ohio represented that Richard Nourse 'no longer works at Pioneer Chevrolet.' This statement was accurate at the time it was made; but later that month [in fact, within a few days] he resumed his part time employment at Pioneer Chevrolet, and even now continues to work there. Mid-Ohio's obligation to correct the record in this respect seems obvious." (SID, para. 67).

37. It is suggested that the Nourses elected not to reveal Richard's employment status on advise of counsel. Br. at 9-10. It is well settled that applicants are charged with the responsibility of keeping their applications current, 47 CFR §1.65, and that they "cannot abdicate [that] responsibility to [their] legal counsel." RKO General, Inc., FCC 86R-19, released April 3, 1986, at para. 4; see Vela Broadcasting Co., 102 FCC 2d 997, 1000 (Rev. Bd. 1985). Moreover, MOC's own counsel indicated that it was Carl and Richard Nourse's decision not to report this significant information. See para. 31, supra. Additionally, as is the case herein, where a representation is made that a principal will be integrated on a 40 hour per week basis, other demands on the applicant's time are obviously relevant in determining the credibility of the proposal, particularly where they regularly involve travel outside the immediate area of the station. Metro Broadcasting, Inc., 99 FCC 2d 688, 701 (Rev. Bd. 1984) (fulltime integration credit not given where principal, a state legislator, spent two months per year at state capitol); Berryville Broadcasting Co.,

70 FCC 2d 1, 11-12 (Rev. Bd. 1978) (integration disallowed where principal resided and managed a station in a community located three hours round trip drive from community of license). Washington's Christian Television Outreach, Inc., 99 FCC 2d 395, 418-419 (Rev. Bd. 1984); Family Broadcasting Group, 93 FCC 2d 771, 778 (Rev. Bd. 1983). Thus, Richard Nourse's significantly changed vocational status, involving "weekly" two or three day pilgrimages (at a minimum) to Marietta, Ohio, some 120 miles from Westerville (with a driving time of at least two and one-half hours), was a patently critical factor to be considered in assessing the likelihood that his integration proposal would be implemented. Therefore, we hold that MOC seriously violated Section 1.65 of the Commission's Rules by its deliberate failure to report this material information.

38. Turning to the misrepresentation aspect of the remand issue, we must address what Richard Nourse did, or did not do, on behalf of WBBY(FM). It is obvious that, if this were a comparative proceeding, we could not allow credit for management participation in station activities by Richard Nourse, since the bulk of his duties and activities were manifestly non-managerial in nature, and "without management and policy functions an applicant's principals do not merit ownership integration credit."¹⁷ Of course, since this is no longer a comparative proceeding, this consideration is essentially moot. However, the activities of Richard Nourse at WBBY(FM) are an important consideration with regard to the key conclusion of the ALJ that "Richard Nourse's participation in station affairs was sufficiently extensive to permit a good faith claim that during the course of the hearing he was devoting about 40 hours per week to station affairs" (SID, para. 71). We agree with the Bureau that the record herein, as a whole, plainly reveals that Richard Nourse did not function in any true managerial capacity and, in fact, did not live up to his commitment to perform services for WBBY(FM) on a full time basis. Hence, we find that the Bureau's exceptions, delineated in paras. 24-27, supra, are well taken and accurate. It is obvious

¹⁷ See Makai Broadcasting, Inc., 102 FCC 2d 322, 324, 58 RR 2d 1488, 1489 (Rev. Bd. 1985); Apogee, Inc., 99 FCC 2d 979, 987, 57 RR 2d 1585, 1591 (Rev. Bd. 1985).

that the representations to the Commission that Richard was, on an ongoing basis, devoting full-time to the affairs of WBBY(FM) (and the Nourse family entities relating to the operation of the station) were no more than hollow and deceptive attempts to purloin a comparative preference in the initial hearing proceeding.¹⁸ Cf. Knoxville Broadcasting Corp., 103 FCC 2d 669, 680-683 (Rev. Bd. 1986) (applicant principal who ignored "full time" management pledge to SBA found untrustworthy on "full time" integration pledge).

39. We hold that the entire record, and the facts and circumstances leading up to this unavoidable conclusion, pellucidly reveal that MOC had every motive and intent to falsely portray its integration proposal to gain a comparative advantage over its then-existing competing applicant, Metro. Having been dealt a winning hand ¹⁹ at the original hearing proceeding by Metro's election to not cross-examine Richard Nourse and his representations of full-time employment at WBBY(FM), MOC was subsequently trumped by Metro's diligent investigation. At the remand hearing, the principals of MOC chose to "stonewall," and continued to represent on numerous occasions that Richard was devoting "full time" to WBBY(FM). Thus, with respect to the ALJ's splanchnic observation

¹⁸ The evidence herein also demonstrates that Carl Nourse (under whose strong influence, dominion and control Richard Nourse acted) likely had no intention of installing Richard as Station Manager, or allowing him to function as same. We suspect that Carl Nourse's underlying perception and beliefs about the operation of the station can best be demonstrated by his own testimony concerning the running of his automobile businesses and utilization of car salesmen:

... (B)asically you give them a straw hat, a cane, you give them no place to sit down, you keep them on their feet, they're moving, you have a telephone in the middle of the floor. They sell their relatives the first ten days. They sell their friends the next 20 days and if at the end of six weeks they haven't gotten into the (selling) of things you move them on and bring in another one. (Tr. 1097)

¹⁹ MOC's principals must have felt like high-stakes gamblers who, playing Baccarat (Chemin de Fer), turn over the banker's cards to reveal the highest hand, a "natural nine". Such an event usually evokes the fulgid cry of "banco". Herein, after reviewing the entire record, we can only perceive the rumblings of "bunco".

that MOC's repeated failure to "come clean" and reveal Richard's employment at Pioneer Chevrolet was no more than a "single transgression," we concur with the essence of the Bureau's counter-argument that MOC did, in fact, willfully and repeatedly continue its misrepresentations on numerous occasions more specifically delineated hereinbelow.

40. MOC's answers to interrogatories dated September 1, 1982, that Richard Nourse no longer worked at Pioneer Chevrolet, on the date, may have been technically correct. However, Richard's own statement, set forth at para. 30, supra, reveals that, within a matter of a few days, he was back in Marietta, Ohio, managing the Nourses' automobile dealership. Additionally, MOC should have disclosed this pertinent and significant fact on numerous subsequent occasions. These other occasions include the following:

A. October 20, 1982: Mid-Ohio prepared Exhibit 2 stating that Richard Nourse had worked at Pioneer Chevrolet in the summer of 1982 as "Acting" General Manager but did not state that Richard Nourse was again working the same amount of time at Pioneer Chevrolet with added responsibilities.

B. October 25, 1982: Mid-Ohio supplemented its answers to interrogatories by stating that Richard Nourse's time devoted to WBBY had "varied" but failed to state that Richard Nourse was working (at least) two days per week as General Manager of Pioneer Chevrolet.

C. November 16, 1982: Richard Nourse testified at the hearing that his written testimony, Mid-Ohio, Ex. 2, was true and correct without even mentioning his managership of Pioneer Chevrolet.

D. January 25, 1983: In its reply findings, Mid-Ohio stated that Richard Nourse was "fulfilling his commitment" to the station at the present time even though Richard Nourse was by then spending (at least) three days per week at Pioneer Chevrolet.

E. October 17, 1983: Mid-Ohio stated in its exceptions to the ID that Richard Nourse was working more than 40 hours per week as "Station Manager" assisting the General Manager in all areas of station operation, when in fact he was devoting less time than before on station affairs and was now spending at least three days per week as General Manager of Pioneer Chevrolet.

F. November 16, 1983: In a declaration in response to Metro's motion to enlarge issues and reopen the record, set forth in pertinent part verbatim et literatim at para. 30, supra, Richard Nourse stated that he continued to work 30-40 hours per week on station affairs even though, in fact, a new General Manager had been hired at WBBY (FM). Also, within two weeks thereafter he had moved to Marietta with his new wife and no longer commuted to the station.

Indeed, the fact the Richard Nourse had permanently motored to Marietta and Pioneer Chevrolet, and by his own admission had exhausted of the day-to-day operation of WBBY, was muffled and not disclosed to the Commission until January 28, 1985. See MOC Motion for Summary Decision, filed January 28, 1985, at 22. Further, Richard Nourse's move and vocational trade-in was disclosed only after the question was raised by Bureau counsel at Richard Nourse's deposition on December 19, 1984. See id., Attachment No. 2. It was then abundantly clear that Richard had not been the spark plug he claimed to be at WBBY(FM); he was a simple hood ornament in Westerville, while the rest of the vehicle was parked in Marietta.

41. The testimony at the remand hearing provides further evidence of MOC's continuing deceptions before the Commission. At the remand hearing, when Carl Nourse was questioned about his testimony at the original hearing proceeding that Richard Nourse, as part of his full-time managerial activities, prepared WBBY(FM)'s "employee manual," the record reveals the following (Tr. 1217, emphasis added):

[BUREAU COUNSEL]: Can you explain [why] at the hearing there you testified that you created the employee manual and now you say that it was Dick's idea?

[CARL NOURSE]: No excuse. The testimony was given today is correct. I erred.

Indeed. Further, when the ALJ cross-examined Carl Nourse concerning his initial hearing representations that David Freeman was the purported "General Manager" (under whom Richard Nourse allegedly worked), the following colloquy ensued (Tr. 1134-35; emphases added):

[CARL NOURSE]: Frankly I never considered Freeman as general manager at the operated function and was only held accountable and was even paid as the sales manager.

[JUDGE CONLIN]: Well, when you said in your testimony that you consult with the station's general manager, who did you have in mind?

[CARL NOURSE]: I've really never had that question posed to me until this moment.

[JUDGE CONLIN]: Well, until this moment, meaning the last day or two that you asserted that you were general manager of the station. What I want to know is, in that testimony, met frequently with the station's general manager, who were you referring to?

[CARL NOURSE]: I never, never, never said that Freeman had the title revoked.

[JUDGE CONLIN]: Look, I just want an answer to my question. Meeting frequently with the station's general manager is part of your testimony. Who is the individual you had in mind when you were making that statement?

[CARL NOURSE]: The person—you won't let me qualify him—

[JUDGE CONLIN]: Just tell me the answer. It's a very simple question.

[CARL NOURSE]: You're asking me who I was meeting with as general manager—

[JUDGE CONLIN]: Who did you have in mind when you made that statement at the hearing in Columbian Meeting frequently with the station's general manager. Who did you expect me and everyone else in the hearing room to think that person was. Surely not Carl Nourse?

[CARL NOURSE]: Freeman had the title of General Manager.

[JUDGE CONLIN]: So, in other words—well, you tell me. Just answer my question directly. Who were you referring to in that sentence?

* * *

[CARL NOURSE]: —as it is structured there that's in the confines of the public knowledge of the station's operations he was the—

[JUDGE CONLIN]: Don't qualify it. Answer my question directly. It's a very simple question and I'm getting tired of equivocating. Just tell me what person you had in mind when you made that statement? Give me a name!

[CARL NOURSE]: Freeman.

[JUDGE CONLIN]: All right. Is that your answer?

[CARL NOURSE]: That's the answer I'll give. ²⁰

²⁰ It may be posited that Mr. Nourse's oily evasiveness and continued efforts to grease the wheels of administrative due process precludes a sound determination of who was, in fact, WBBY(FM)'s "mystery manager." In any event, it is doubtful that it was Chevrolet's "Mr. Goodwrench."

42. In sum, while we concur with the ALJ's conclusions concerning the failure of MOC to notify the Commission of the material and significant changed circumstances regarding Richard Nourse's employment activities, we must modify his conclusions pertaining to the misrepresentation aspects of the remand issue. We believe that the record herein conclusively demonstrates that the Nourses and MOC had every motive and intent to deceive the Commission in order to purloin every comparative advantage it could garner at the initial hearing proceeding. It is incredible to believe that Richard Nourse concurrently devoted full time to MOC, WBBY(FM), and the Nourse family business entities related thereto, as MOC represented prior to, during, and after the original hearing. Even when presented with numerous opportunities to "come clean" and clear the record, MOC and the Nourses continued to dissemble, obfuscate and waffle in a vain attempt to force the facts to fit their representations; or, as the Bureau aptly phrased it, they "continued to stonewall the evade the truth at the remand hearing". Br. at 13. Given motive and intent; the changed testimony at the renewal hearing; the lack of actual managerial activities, actions, and duties of Richard Nourse with respect to the day-to-day operation of WBBY(FM); the inherently incredible testimony that Richard, in essence, peregrinated frequently from the family's automobile dealership in Marietta, Ohio, some 120 miles from WBBY(FM); the fact that Richard was more than actively involved in numerous other family businesses, and did not maintain an office or a desk at the radio station, and was not even paid by WBBY(FM); and, the testimony of all the non-family member witnesses, we can reach no other conclusion but that this concatenation of facts and circumstances clearly reveals MOC willfully and repeatedly intended to, and did, deceive the Commission.

43. Ultimate Conclusion: We concur with the ALJ that the failure of MOC to disclose Richard Nourse's employment at Pioneer Chevrolet was misleading and lacking in candor. (SID, para. 74). A licensee's record of noncompliance with the Commission's Rules provides direct evidence of anticipated future behavior as a public trustee. The record in this proceeding reveals direct evidence of MOC's total disregard for the need to be truthful and honest with the Commission. MOC's violation

of Section 1.65 of the Commission's Rules, and repeated lack of candor before the Commission, especially in a hearing proceeding, are indicative of its future behavior. It is well-settled that in order to discharge its duties effectively, "the Commission must, of necessity, rely upon the statements and submissions of its licensees . . . The fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." Lebanon Valley Radio, Inc., 35 FCC 2d 243, 258 (Rev. Bd. 1972), review denied, 39 FCC 2d 1099 (1973), rev'd on other grounds sub nom. Lebanon Valley Radio, Inc. v. FCC, 503 F.2d 196 (D.C. Cir. 1974). See also FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). Since the Commission must license thousands of radio and television stations in the public interest, it must therefore rely substantially on the completeness and accuracy of the submissions made to it. WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1139 (D.C. Cir. 1985); RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). It is manifest that applicants before the Commission "have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." Id. at 232. Herein, the record evidence, as a whole, establishes that MOC conducted a pattern of deliberate and repeated violations of Section 1.65 of the Commission's Rules. This violation of Section 1.65 undermined the administrative fairness in the initial comparative hearing by withholding pertinent information about MOC and its composition from the Commission and Metro during the hearing proceedings. See Bay Television, Inc., 95 FCC 2d 181 (Rev. Bd. 1983), review denied, FCC 85-58, released March 25, 1985, aff'd by judgment (mem.) sub nom. Home TV, Inc. v. FCC, No. 85-1256 (D.C. Cir. March 27, 1986).

44. With respect to the lack of candor on the part of MOC, such a conclusion can in and of itself lead to the sanction of disqualification. RKO General, Inc. v. FCC, supra. The Commission has held that false statements in the course of the hearing process are, in and of themselves, of substantial significance. Nick J. Chaconas, 28 FCC 2d 231 (1971), recon. denied, 35 FCC 2d 699 (1972), aff'd sub nom. Chaconas v. FCC, 486 F.2d 1314 (D.C. Cir. 1973). Additionally, lack of

candor need not be specifically designated as a hearing issue because "truth and candor are always in issue." William M. Rogers, 92 FCC 2d 187, 199-201 (1982); The Old Time Religion Hour, Inc., 95 FCC 2d 713 (Rev. Bd. 1983), recon. denied, 96 FCC 2d 551 (Rev. Bd. 1984), review denied, FCC 85-104, released March 5, 1985, review of recon. dismissal dismissed, FCC 86-165, released April 15, 1986.

45. We are fully aware that we are now governed by the provisions of the Commission's recently-released Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy Statement) (Gen. Docket No. 81-500); Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees (BC Docket No. 78-108), 102 FCC 2d 1179 (1986). Therein, the Commission directed that all proceedings currently before it should generally be resolved consistent with the policies set forth in the Character Policy Statement. Moreover, we have recently been admonished by the Commission that our perhaps somewhat wistful suggestion in another proceeding that demerits might still be awarded in some circumstances is clearly not correct. Broadcast Associates of Colorado, FCC 86-215, released May 9, 1986, at note 5, citing Professional Radio, Inc., 59 RR 2d 1173, at note 11 (Rev. Bd. 1986). Thus, we are faced with the ultimate determination of whether or not MOC is qualified to be a broadcast licensee under the clear guidelines of the Character Policy Statement.

46. In its Character Policy Statement, the Commission succinctly declared (102 FCC 2d 1179, 1209-11):

We believe it appropriate to give misrepresentation specific consideration in the context of this Policy Statement. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealing with the Commission.

* * *

As we have stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

* * *

We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees.

47. In this era of deregulation, the Commission now requires very little of its licensees. However, it is patently clear from the foregoing provisions of the Character Policy Statement that honesty and forthrightness remain of paramount concern to the Commission. Herein, we have concluded that MOC manifestly has not exhibited these important traits. The preponderance of the record evidence, as a whole, establishes that MOC conducted a pattern of willful, deliberate, and repeated violations of the Commission's Rules. Steadman v. Securities and Exchange Commission, 450 U.S. 91 (1981).²¹ MOC has violated Section 1.65 of the Commission's Rules, it has exhibited a substantial lack of candor in hearing proceedings, and has repeatedly misrepresented crucial facts to the Commission. There are perhaps thousands of potentially qualified broadcast licensees who could properly deal with the Commission under its few remaining rules and regulations;

²¹ Our finding of a serious lack of candor is also consistent with the higher-than-usual standard of clear and convincing evidence (Bellingham Television Associates, Ltd., 59 RR 2d 978, para. 6 (Rev. Bd. 1986)), which one Board Member believes is applicable in renewal cases involving either sensitive lack of candor or constitutional issues. See Tr. 1478-1483, and Broadcast Associates of Colorado, 100 FCC 2d 616, 625 (Rev. Bd. 1985) (dissent), reversed FCC 86-215, released May 9, 1986. See also David Hildebrand, 92 FCC 2d 1241, 1243-1244 (Rev. Bd. 1983), and Faith Center, Inc., 94 FCC 2d 756, 759-760 (Rev. Bd. 1983). Cf. Alan K. Levin, 97 FCC 2d 1, 5-6 (Rev. Bd. 1984) (subsequent history omitted).

however it is obvious that MOC is not one of them. Thus, in light of the foregoing we hold that MOC has not demonstrated that it is qualified to be a broadcast licensee.

48. We are not unmindful of the harsh result reached herein; however, we unanimously agree that a significant sanction must be accorded this licensee. To allow MOC to profit from its egregious wrongdoing would be unthinkable. As the Commission's own Mass Media Bureau noted in its Exceptions, to grant an unfettered renewal of the license of WBBY (FM) would "send a signal to Commission licensees that . . . deceptive and dishonest conduct is acceptable." Br. at 9. Under the clear language of the extant Character Policy Statement, existing or potential Commission licensees are either qualified or they are not qualified. Nevertheless, the eloquent observations expressed in note 1 to the attached separate statement are well taken. Thus, we believe that in this proceeding it is for our superiors to accord any lesser sanction short of outright denial.

49. ACCORDINGLY, IT IS ORDERED, That the application for renewal of license of WBBY(FM), Westerville, Ohio, filed by Mid-Ohio Communications, Inc. (File No. BRH-790601F6), IS DENIED.

Eric T. Esbensen
Member, Review Broad
Federal Communications Commission

Separate Statement
of
Board Member Norman B. Blumenthal
with
Board Chairman Marino joining in Note 1.

I endorse the laborious and meticulously documented decision penned by Board Member Esbensen. As a former (and recent) broadcast licensee himself, the hard decision to apply the terminal sanction of non-renewal has surely given him at least as much occasion for pause as it does all Commission decision makers. Compare, e.g., Stearns County Broadcasting Company, Inc., FCC 86R-40, released June 25, 1986 (reversing ALJ disqualification of licensee). A finding of "unqualified" is severe; a "blunderbuss" in the words of Judge Mikva.¹ On the other hand, it would be — no doubt — galling for former, and current, broadcasters who spend considerable time, money and attention to the regulatory responsibilities imposed by the Commission were we to renew the Nourses, whose attitude towards our most basic responsibility is, to put it mildly,

¹ WADECO, Inc. v. FCC, 628 F.2d 122, 133 (D.C. Cir. 1980) (dissenting statement). For whatever little value, this writer has believed for the past 20 years that the most severe penalty of the Communications Act ought be compulsory divestiture. If our regulatory authority is truly premised on the precept that "the airwaves belong to the public," it is sufficient in the case of disqualifying licensee misconduct to compel the wrongdoer to vacate its spectrum slot. Revocation and non-renewal go far beyond that removal remedy, extracting the accrued or enhanced economic value of the licensee's business interest, which has nothing — of course — to do with simply assuring that an untrustworthy licensee does not retain its broadcasting privilege. The economic penalty is purely gratuitous, confiscatory, and generally unconsionable. Were the remedy of compulsory divestiture our most severe penalty, the Commission might not be perceived as straining to avoid the present Act's ultimate sanction, see, e.g., Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 570, (D.C. Cir. 1982) (court "troubled" by dearth of TV licenses lost to challengers), a sanction wholly disproportionate to any FCC offense in the multi-hundred million dollar milieu of today's licenses. No other civil sanction in law approximates the harshness of loss of a station license; nor do most criminal sanctions, in fact, short of rape, homicide, or treason. A violation of 47 CFR §1.65, however aggravated, should not cost an offender over \$400 million. See RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). But, until our anachronistic law changes, we must apply it neutrally.

"lump it." Not only would no one in control of their senses buy the proverbial "used car" from them, they would be equally unsound to extend a particle of trust in anything valued at more than, say, a balsa nickel. As is clear from this decision and the underlying record, "truth" to this licensee is purely a metaphysical construct, a negotiable condition — not unlike the condition or history of a used Chevrolet. We are awarding broadcast licenses worth over seven figures; attempts to steal one from a competing applicant with material untruths cannot be abided. See generally Character Policy Statement, 102 FCC 2d 1179 (1986) (*passim*).

As the decision accurately observes, ante, paras. 45-47, the Commission's recent Character Policy Statement de-emphasizes much non-FFCC misconduct, but coterminously apotheosizes candor and truthfulness to the Commission as the most reliable index of licensability. See, e.g., *id.*, at 1195-1198; 1209-1211. We believe that the Commission's Character Policy Statement means what it says; anything else rudely suggests a lack of candor on the part of the agency itself. That, of course, is unthinkable, as witness the Character Policy Statements's reiteration of the principle that:

The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.

Id., at 1210 n. 77 (quoting FCC v. WOKO, 329 U.S. 223, 227 (1946)).²

² But compare *id.* with Broadcast Associates of Colorado, FCC 86-215, released May 9, 1986 (citing Character Policy Statement but holding that admitted misrepresentation at hearing and false application certification not disqualifying, reversing 100 FCC 2d 616 (Rev. Bd. 1985) (majority opinion). See also Character Policy Statement, 102 FCC 2d at 1211, declining to "renounce authority" over "immaterial misrepresentation," but indicating intent to "consider all the facts of a case."

The Board has employed the lesser sanction of a short-term renewal,³ and seriously considered that sanction here. However, that sanction is appropriate when the purpose is to test future compliance with FCC operating requirements, and is plainly inapposite when dealing with egregious lack of candor in the very prosecution of a competing application. For the latter, there is no routine opportunity to "test." Here, we are confronted not with WOKO's "immaterial and useless deceptions," but with grave ones going to the core of the licensee's comparative application. In such cases, the Character Policy Statement demands the result here obtaining. We have "consider[ed] all the facts of [this] case in . . . the disposition of matters involving misrepresentation or lack of candor," 102 FCC 2d at 1211, yet find little to mitigate this licensee's premediated pattern of lack of candor.⁴ Disqualification must follow. The Old Time Religion Hour, Inc., 95 FCC 2d 713 (Rev. Bd. 1983), review denied, FCC 85-104, released March 5, 1985, recon. dismissal aff'd, FCC 86-165, released April 15, 1986.

³ E.g., Gross Telecasting, Inc., 92 FCC 2d 204 (rev. Bd. 1982), review denied, FCC 83-443, released November 21, 1983.

⁴ To the extent that the licensee asserts improper legal advice, the law provides ample remedies for any professional malfeasance. An applicant must take responsibility for its own affirmative deceit. WADECO, supra; cf. RKO General, supra (licensee found disqualified for station under renewal challenge even absent intent to deceive and reliance on counsel).

Appendix E

Federal Communications Commission

FCC90-65

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-282

In re: Application of

MID-OHIO
COMMUNICATIONS, INC.

File No. BRH-790601F6

For Renewal of License of
Station WBBY (FM),
Westerville, Ohio

ORDER

Adopted: February 8, 1990;

Released: February 21, 1990

By the Commission:

1. Before the Commission are: (1) an Application for Review filed August 8, 1986 by Mid-Ohio Communications, Inc. (MOC); (2) an Opposition filed September 5, 1986 by the Mass Media Bureau; (3) an Information Statement filed October 3, 1986 by MOC, and (4) a Motion to Dismiss Information Statement filed October 15, 1986 by the Bureau.

2. These pleadings relate to the Review Board's decision denying MOC's application for renewal of its license to operate station WBBY (FM) in Westerville, Ohio, *Mid-Ohio Communications, Inc.*, 104-FCC 2d 572 (Rev. Bd. 1986). The Board found that MOC lacked candor and committed misrepresentations in claiming, during the comparative phase of this proceeding, that Richard Nourse, MOC's 24 percent stockholder, served as its full-time station manager. The Board found that MOC deliberately concealed the fact that Nourse had extensive outside responsibilities in connection with a

family-owned business (he managed Pioneer Chevrolet-Cadillac in Marietta, Ohio, 120 miles from Westerville)¹ that cast doubt on the credibility of Nourse's claimed integration in the station's management.² The Board also found that MOC's characterization of Nourse's role as full-time station manager involved misrepresentations.³

3. We agree with the Board's resolution of this case, and we therefore adopt its decision except as otherwise indicated. Nonetheless, we wish to comment on two matters.

4. MOC complains that the Board overturned an ALJ's finding that MOC did not commit misrepresentations about Nourse's role. MOC contends that, in doing so, the Board ignored the ALJ's favorable credibility findings as to MOC's witnesses and ignored uncontroverted testimony. We find no error in the Board's action in this regard. In reaching its conclusions, the Board accorded due deference to the ALJ's findings and did not ignore the fact that certain testimony was uncontroverted. The Board's differences with the ALJ arose because (1) the Board and the ALJ differed as to the ultimate interpretation that should be given the findings of fact on which they agreed, and (2) the Board focused on aspects of the testimony which the ALJ did not specifically address. The Board did not reverse any specific factual findings by the ALJ as to which demeanor could be considered critical. Therefore, there were no relevant ALJ findings entitled to special deference. The Board has the authority to make its own credibility determinations. See *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 870 n.23 (D.C. Cir. 1977). Similarly, the Board is not required to draw the same conclusions as MOC would like from uncontroverted testimony. Thus, MOC's complaints are without foundation.⁴

5. As an additional matter, we conclude that the disqualification of MOC on the facts of this case appropriately reflects the seriousness with which we view dishonest conduct by licensees. See *Character Qualifications*, 102 FCC 2d 1179, 1210-11 paras. 60-61 (1986), recon. denied, 1 FCC Rcd 421 (1986). We especially wish to voice our disagreement with MOC's claim that the facts of this case are no more egregious than those of cases in which sanctions short of disqualification have been imposed, notably *Bay Television, Inc.*, 95 FCC 2d 181, 181-85, paras 7-10 (Rev. Bd. 1983), modified, FCC 85-58 (Mar. 25, 1985), in which a substantial comparative demerit

was imposed for lack of candor. In *Bay*, an applicant voluntarily rectified a reporting violation prior to the start of the hearing. Here, by contrast, the record indicates a pattern, throughout this proceeding, of deliberate concealment and false statements regarding a matter of potentiall crucial importance.⁵

6. IT IS ORDERED. That the Mass Media Bureau's Motion to Dismiss Information Statement filed October 15, 1986 IS GRANTED and the Information Statement filed October 3, 1986 by Mid-Ohio Communications, Inc. IS DISMISSED, because we find no good cause for entertaining this unauthorized pleading, which merely reports that an ALJ cited the Board's decision in this proceeding.

7. IT IS FURTHER ORDERED. That pursuant to C.F.R. §1.1115(g) the Application for Review of Mid-Ohio Communications, Inc. filed August 8, 1986 IS DENIED.

8. IT IS FURTHER ORDERED. That the application for renewal of license of WBBY(FM) filed by Mid-Ohio Communications, Inc. (File No. BRH-790601F6) IS DENIED.

9. IT IS FURTHER ORDERED. That Mid-Ohio Communications, Inc. IS AUTHORIZED to continue operation of station WBBY (FM) until 12:01 a.m. of the ninety-first (91st) day following the release of this order to enable the licensee to conclude the station's affairs: PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our order, it IS AUTHORIZED to continue to operate the station until 12:01 a.m. of the ninety-first (91st) following the release of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate: provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the licensee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial or renewal, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ We agree with the Board that MOC had a clear duty to report Nourse's involvement with Pioneer. As the Board points out, MOC represented in its pleading that Nourse *currently* served as WBBY (FM)'s station manager and specifically stated in one pleading that Nourse no longer worked at Pioneer. 104 FCC 2d at 591-93, paras. 34-37. Moreover, recent cases hold that an applicant's outside responsibilities may, in appropriate circumstances, undermine the credibility of an integration proposal. *See e.g., Berryville Broadcasting Corp.*, 70 FCC 2d 11-12, paras. 16-18 (Rev. Bd. 1978). Accordingly, this case is not governed by precedent such as *Warwick Broadcasting Corp.*, 15 FCC 2d 1015, 1018-19, paras. 8-9 (Rev. Bd. 1969), cited by MOC.

² We wish to observe that Richard Nourse himself testified that MOC's attorneys were concerned that failing to disclose Nourse's outside employment might be considered deceptive. MOC Exh. 1-R at 13. We consider this additional evidence of MOC's improper state of mind. Moreover, for this reason and the reasons cited by the Board (104 FCC 2d at 592-93, para. 37), we reject MOC's argument that its actions are mitigated by reliance on counsel. *See Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 102-03, para 43 (1981).

³ We note the following additional evidence that Nourse's duties were not full-time throughout the relevant time period. First, Nourse's participation at management meetings declined continuously throughout the period. *See* 104 FCC 2d at 614, para 39, 616 para 47, 617, para 54. Second, in accounting for the time Nourse spent on station affairs, MOC attempts to claim credit for time Nourse spent while primarily involved at his other employment, long distance telephone calls, visits to his parents' house, and weekend work. 104 FCC 2d at 717-18, paras 55-58. Such activities do not conform to the Commission's standard of substantial participation in the day-to-day operation of the station. *See Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989-90 (1984).

⁴ MOC also complains that the Board's decision makes derogatory and unnecessary references to people involved in the automobile industry. 104 FCC 2d at 594 n.18 597 n.20, 602. We agree that such comments are superfluous and we disavow them.

⁵ Three other cases principally relied on by MOC are also distinguishable in terms of the nature and seriousness of the conduct at issue. These are: *Merrimack Valley Broadcasting, Inc.* 92 FCC 2d 506, 520 para 24 (Rev. Bd. 1982), rev. denied, 55 RR 2d 23 (1983), recon. granted in part, 99 FCC 2d 682 (1984) (the Board imposed no demerit for failure to report change in limited partner's employment, where matter was of no decisional significance and there was no intent to conceal); *Valley F.M. Radio*, 99 FCC 2d 924, 928-29, paras 12-14 (Rev. Bd. 1984) (the Board found no misrepresentation or lack of candor, where no issue had been designated and the ALJ — in rejecting applicant's explanation for unattended operation — made no finding that misrepresentation or lack of candor occurred before him); and *American International Development, Inc.*, 75 FCC 2d 109, 131-37, paras 47-57 (Rev. Bd. 1979), modified, 86 FCC 2d 808, 817-18, paras 20-21 (1981) recon. denied. 50 RR 2d 370 (1981) (substantial demerit imposed, where the applicant made four misstatements in a showing concerning programming, one of which as an inadvertent error, two of which were deemed exaggerations that were not deliberate falsehoods, and one of which as deemed inaccurate and unexplained: the Board found that the inaccuracies were not the sort of calculated deception that destroys a reasonable expectation of reliability.) These cases do not involve the type of serious misconduct found here.

Appendix F

Federal Communications Commission

FCC 90-266

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-282

In re Application of

MID-OHIO
COMMUNICATIONS,
INC.

File No. BRH-790601F6

For Renewal of License of
Station WBBY(FM),
Westerville, Ohio

ORDER

Adopted: July 13, 1990;

Released: July 23, 1990

By the Commission:

1. The Commission has before it an order upholding a Review Board decision which denied Mid-Ohio Communications, Inc. (MOC) renewal of station WBBY(FM) in Westerville, Ohio, *Mid-Ohio Communications, Inc.* 5 FCC Rcd 940 (1990), *denying review of* 104 FCC 2d 572 (Rev. Bd. 1986). *See also Mid-Ohio Communications, Inc.* 104 FCC 2d 604 (I.D. 1985). The Commission agreed with the Board that MOC lacked candor and made misrepresentations to the Commission and that the foregoing misconduct warranted denial of MOC's license renewal. MOC now seeks reconsideration of the Commission's action.¹

I. BACKGROUND

2. In a series of pleadings filed while this was a comparative renewal proceeding. MOC repeatedly represented that its 24.7 percent stockholder, Richard Nourse (Nourse), served and would continue to serve as WBBY(FM)'s full time or 40 hour per week station manager. 104 FCC 2d at 606-07, paras 5-9. MOC claimed comparative integration credit based on these representations. The Commission concluded that MOC's claims that Nourse served as WBBY(FM)'s full-time station manager were lacking in candor and were misrepresentations. MOC deliberately failed to report that Nourse had outside employment with a family-owned dealership which, if disclosed, would have undermined the credibility of his supposed role as station manager. Furthermore, the Commission concluded that a detailed examination of Nourse's participation in station affairs belied the claim that he could fairly be described as a full-time station manager.

3. MOC's petition for reconsideration largely reiterates arguments made in its application for review of the Board's decision, which the Commission denied. Thus, MOC again argues that (1) the Board improperly overturned the ALJ's favorable credibility findings and ignored uncontroverted evidence by MOC's witnesses. (2) the Board was biased against automobile dealers. (3) MOC had no obligation to report Nourse's outside employment. (4) MOC relied on advice of counsel.² (5) the record here does not demonstrate misrepresentation by clear, precise and indubitable evidence³ and (6) MOC's conduct does not warrant disqualification.⁴

4. MOC's repetitious arguments provide no basis for granting reconsideration. *SEE WWIZ, Inc.*, 37 FCC 685, 686 para 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC.*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed as repetitious. 47 C.F.R. § 1.106(b). Nonetheless, our examination of MOC's petition for reconsideration persuades us that it would be desirable to restate the basis for our action to avoid the possibility of misunderstanding. Additionally, MOC's petition raises two new matters that warrant discussion.

II. BASIS OF PRIOR ACTION

5. During the period in which MOC made its representations that Nourse served as WBBY(FM)'s full-time or 40 hour per week station manager⁵, it failed to report that Nourse spent 2-3 days per week managing a family-owned automobile dealership in another city more than 100 miles from Westerville. Reporting was clearly necessary under 47 C.F.R. § 1.65 because Nourse's outside responsibilities were relevant to the validity of the claim that Nourse currently served and would continue to serve as full-time station manager.⁶ Moreover, MOC specifically stated in one pleading that Nourse no longer worked at the automobile dealership and implied as much in another. 104 FCC 2d at 606, paras 5,7. The record indicated that MOC's attorneys informed MOC that a failure to report might be considered misleading.⁷ MOC Exh. 1-R at 13. MOC's failure to disclose Nourse's outside employment under these circumstances represented a serious lack of candor.⁸

6. Moreover, an examination of the record indicated that MOC's characterization of Nourse as WBBY(FM)'s full-time station manager was not accurate. In this regard, the Commission upheld the Review Board's action reversing the ALJ on this point. Examining the record evidence, particularly the testimony of MOC's witnesses, the ALJ concluded that, although the record did not fully corroborate MOC's claim that Nourse was the full-time station manager, his duties substantially complied with MOC's claims. 104 FCC 2d at 623-24, paras 71-72. The Commission agreed with the Board that Nourse's duties as described could not reasonably be characterized as those of a full time station manager and that MOC's claims were unrealistic and not made in good faith, especially given MOC's clear motive to exaggerate the significance of Nourse's role. Thus, the Board and Commission, while accepting the ALJ's basic factual findings, disagreed with the inferences he drew from those findings.⁹ The Board also focused on aspects of the record that the ALJ did not specifically address: for example, the Board observed that MOC's principal, Carl Nourse, contradicted his prior testimony in attempting to bolster Richard Nourse's responsibilities at the station. *Id.* at 583-84, para 26, 596 para 41.

7. In the Commission's view, the record confirmed the inherent improbability that Nourse served as a full-time manager of WBBY (FM) while also managing an automobile dealership in a city 120 miles away. For example, during the relevant time period, Nourse's attendance at station management meetings declined continuously. 104 FCC 2d at 614, para 39, 616, para 47, 617 para 54. Additionally, to support its claim that Nourse devoted 40 hours per week to station affairs, MOC attempted to rely on time Nourse spent while primarily involved at the automobile dealership, long distance telephone calls, visits to his parents' house and the like — as opposed to his physical presence at the station. *Id.* at 617-18, paras 55-56. In the Commission's view, these activities did not comport with the Commission's definition of integration into management, and they corroborated the inference that MOC left a misleading impression when it described Nourse as WBBY (FM)'s full-time station manager, without qualification.

8. Similarly, the record indicated that Nourse's duties were not those of a station manager. Nourse's duties — as described by MOC's own witnesses — did not conform to the specific description given in MOC's pleadings.¹⁰ As described by MOC's witnesses, Nourse's duties did not constitute the kind of fixed managerial responsibilities implied by the title "station manager." See *Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264 [sic] (Rev. Bd. 1954), modified, 57 RR 2d 1390 (1955). Rather, Nourse performed a miscellaneous collection of duties, which included assisting other station personnel, performing clerical and other nonmanagerial duties, and performing duties not specific to WBBY (FM). 104 FCC 2d at 614-17, paras 38, 43-44, 46, 49-52. Nourse did not even have an office at the station. MOC Exh. 1-R at 4-6. Indeed, MOC's main witness, Bryan McIntyre, was not comfortable with Nourse's designation as "station manager" (although he said that he considered Nourse's duties managerial). 104 FCC 2d at 583, para 24.

III. NEW MATTERS

9. As noted, two matters in MOC's petition for reconsideration warrant further discussion. First, as previously mentioned, one of the reasons we cited for finding that Nourse was not a full-time manager of WBBY (FM) was that Nourse relied on time spent on such activities as long distance telephone calls to support his claim that he devoted 40 hours to station affairs. MOC argues that our finding is inconsistent with dicta in *Omaha TV 15, Inc.* 4 FCC Rcd 730, 732-33, paras 14-24 (1986). MOC claims that this dicta indicates that integration credit may be given for management involvement without physical presence at the station.

10. The Bureau correctly observes that *Omaha TV 15, Inc.* did not modify the standard — set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) — that integration involves active participation in the day-to-day operation of the station. *Omaha* merely clarified that standard to indicate that a principal may receive credit for integration, although the principal is not physically present at the station five days a week. Thus, a proposal to work ten hours a day, three days a week, would be deemed equivalent to a proposal to work six hours a day, five days a week. It did not imply that an applicant could receive credit for time not spent at the station. See *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989-90, para 10 (1984). In any event, we see no basis for MOC relying on our *Omaha* decision to assume that it could claim integration credit for Nourse, since *Omaha* was decided after the behavior at issue occurred.

11. Second, MOC appends to its petition for reconsideration numerous statements by community residents regarding the character of MOC's principal, Carl Nourse. These statements, however, are not part of the record in this proceeding, and MOC has not moved to reopen the record to receive them. And, in any event, MOC did not show the relevance of these statements. We will therefore not consider these statements.

IV. ORDER

12. ACCORDINGLY, IT IS ORDERED. That pursuant to 47 C.F.R. §1.106(b) the Petition for Reconsideration filed March 23, 1990 by Mid-Ohio Communications, Inc. IS DISMISSED in part as repetitious and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Now pending before the Commission are a Petition for Reconsideration filed March 23, 1990 by MOC, an opposition filed April 5, 1990 by the Mass Media Bureau, and a reply filed April 16, 1990 by MOC.

² In its petition for reconsideration, MOC relies on *WEBR v. FCC*, 420 F.2d 158, 166-68 (D.C. Cir. 1969). In that case, an applicant was assessed a comparative demerit for violating the Commission's reporting rules, its principal having relied on counsel to make the required report. An examination of the Board's decision, upheld by the court, gives no indication that the principal there intended to conceal information. See *Ultravision Broadcasting Co.*, 11 FCC 2d 394, 406 para 28 (Rev. Bd. 1968). Thus, the misconduct was less serious than that involved here. In *Microband Corp. of America*, 44 RR 2d 1490, 1494 n.5 (1978), cited by MOC, advice of counsel was among the factors mitigating remote, nonbroadcast misconduct. See also *RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981), cert. denied, 456 U.S. 927, 457 U.S. 1119 (1982) (disqualifying RKO notwithstanding its claimed reliance on counsel). In any event, MOC has no basis for claiming reliance on counsel. See 5 FCC Rcd at 941 n.2

³ The Board correctly held that the applicable standard of proof is preponderance of the evidence. 104 FCC 2d at 600-01, para 47. See *Steadman v. SEC*, 450 U.S. 91 95-96 (1981); *Lewell Broadcasting, Inc.* 86 FCC 2d 896, 913-14 (1981).

⁴ MOC complains that the sanction imposed here is harsher than that imposed in *Centel Cellular Company of Virginia*, FCC 90-45 (Jan. 11, 1990). There Centel agreed to make a voluntary payment of \$1 million pursuant to a consent decree for alleged antenna fighting violations related to a helicopter accident without admitting the alleged violations. Hence, in that case, unlike this one, there was no adjudicated misconduct.

⁵ In one pleading, MOC characterized Nourse's participation as "living, breathing, integration realized." 104 FCC 2d at 5591, para 34. Given this record, we rejected MOC's insistence (which MOC reiterates in its petition for reconsideration) that Nourse proposed to work at the station only after grant of MOC's renewal application. See e.g. Petition for Reconsideration at 18.

⁶ Because MOC sought comparative credit based on its representations concerning Nourse, MOC was responsible for their accuracy. Although The ALJ ultimately ruled that MOC was not entitled to credit for Nourse's participation, this fact does not in any way diminish MOC's responsibility for any misrepresentations made in connection with its comparative case. See Petition for Reconsideration at 13 n.25.

⁷ Compare *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 620 para 24 (Rev. Bd. 1982), *affirming*, 92 FCC 2d 523, 563-65, paras 173-85 (I.D. 1982). There an applicant failed to report changes in its principals' prospective integration commitments. Upon learning that this was erroneous, the applicant filed a corrective amendment.

⁸ MOC maintained (and continues to do so in its petition for reconsideration) that this case is less egregious than *Bay Television, Inc.* 95 FCC 2d 181, 182-85, paras 4-10 (Rev. Bd. 1983), *modified*. FCC 85-58 (March 25, 1985), in which an applicant received a substantial comparative demerit. See also *Bay Television, Inc.*, 95 FCC 2d 190, 206-14, paras 65-92 (I.D. 1983). In *Bay*, the applicant's proposed general manager accepted outside employment. The Board faulted the applicant for not timely reporting its principal's subsequent resignation as general manager of the proposed station (based on the applicant's hope that the principal would reconsider and adhere to his integration commitment) until its opponent petitioned to enlarge the issues. Although not timely reporting the principal's resignation as general manager, the applicant in *Bay*, unlike MOC, did voluntarily report the principal's outside employment, as well his resignation as an officer and director of the applicant (but not as general manager). *Id* at 207, para 68, 209 paras 75, 77. The applicant also voluntarily disclosed the principal's letter of resignation as general manager in response to a discovery request (although the applicant did not formally report the principal's resignation of that position until the petition to enlarge was filed). *Id* at 211, para 85. Additionally, in response to the petition to enlarge issues the applicant filed an affidavit by its principal which clarified that the principal had abandoned his integration commitment. Thus, in *Bay*, although the applicant did not report all relevant facts in a timely manner, significant information was reported and the inadequacies in reporting were rectified prior to the hearing, which tended to mitigate the deception present there. In contrast, in this case, MOC concealed Nourse's outside employment entirely until MOC's opponent accidentally discovered it after the hearing. Moreover, MOC misrepresented throughout the proceeding that Nourse was its full-time station manager. We also note that, although the applicant in *Bay* received only a comparative demerit, that comparative demerit effectively resulted in the denial of its application.

⁹ Contrary to MOC's contentions, our disagreement with ALJ did not involve overruling any credibility findings or ignoring uncontroverted evidence. In particular, our analysis did not rely to any significant extent on the testimony of David Freeman, a witness whose testimony the ALJ questioned. Additionally, although we had occasion to disavow inappropriate comments by the Board about automobile dealers, we saw no indication that the Board's analysis of the record in any way reflected a bias against individuals in that line of business. Nor did we find it prejudicial that the Board's decision includes a discussion of "background and history" which has not decisional significance. 104 FCC 2d at 574-78, paras 3-11.

¹⁰ For example, the record did not corroborate the claims that Nourse oversaw EEO compliance, that he conducted market research, that he was in charge of station public relations and station maintenance, and that he assisted in sales. Compare 104 FCC 2d at 606-07, para 7 with *id.* at 584 para 27, 614-15 paras 37, 42-43.

¹¹ The presence of continuing supervisory responsibility by a principal whose duties were roughly analogous to a business manager's warranted integration credit in *Miracle Strip Communications, Inc.*, 4 FCC Rcd 64, 5065 paras. 14-16 (1989), cited by MOC. The record here did not indicate that Nourse had the kind of continuing supervisory responsibilities that might reasonably be characterized as those of a full-time "station manager." Because MOC represented that Nourse in fact had that position, this is not a case, such as *Miracle Strip*, in which the issue was merely whether the applicant would receive credit for the claimed integration.

Appendix G

§ 402. Judicial review of Commission's orders and decisions

(a) **Procedure.** Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) **Right to appeal.** Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

- (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
- (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4) By an applicant for the permit required by section 325 of this Act [47 USCS §325] whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
- (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.
- (7) By any person upon whom an order to cease and desist has been served under section 312 of this Act [47 USCS § 312].
- (8) By any radio operator whose license has been suspended by the Commission.

(c) **Filing notice of appeal; contents; jurisdiction; temporary orders.** Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in the scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) **Notice to interested parties; filing of record.** Upon the filing of any such notice of appeal the Commission shall, not later than five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the city of Washington. Within thirty days after the filing of an appeal, the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28, United States Code [USCS § 2112].

(e) **Intervention.** Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) **Records and briefs.** The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) **Time of hearing; procedure.** At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

(h) **Remand.** In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgement, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) **Judgment for costs.** The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) **Finality of decision; review by Supreme Court.** The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28 of the United States Code [28 USCS §1254], by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

(June 19, 1934 ch 652, Title IV § 402, 48 Stat. 1093; May 20, 1937 ch 229 §§ 11-13, 50 Stat. 197; May 24, 1949, ch 139 § 132, 63 Stat. 108; July 16, 1952, ch 879 § 14, 66 Stat. 718; August 28, 1958, P. L. 85-791 § 12, 72 Stat. 945.)

Appendix H

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, § 2(a), (b), 102 Stat 662.)

Appendix I

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINSTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

Rule 15. Review or Enforcement of Agency Orders — How Obtained; intervention.

(a) PETITION FOR REVIEW OR ORDER: JOINT PETITION. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) APPLICATION FOR ENFORCEMENT OF ORDER; ANSWER; DEFAULT; CROSS-APPLICATION FOR ENFORCEMENT. An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the

clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) SERVICE OF PETITION OR APPLICATION. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) INTERVENTION. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

